The European Court of Justice's approach to equality reevaluated, with reference to the work of Michael Walzer.

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Abstract

This dissertation examines, by means of a critical case-study, how the notion of equality is currently interpreted by the European Court of Justice (ECJ), and how it might be interpreted in the future.

It is well-known that the ECJ takes an Aristotelian, comparator-based approach to equality, seeking to ensure that "likes" are treated in like fashion, and "unlikes" in unlike fashion. That this approach has produced inconsistent and unpredictable decisions has been discussed at length in the existing academic literature. However, there have been few proposals for an alternative approach. The dissertation will attempt to bridge this gap, by suggesting that Michael Walzer's theory of "complex equality" might be employed by the Court to achieve better, clearer, or more predictable outcomes.

The first part of the dissertation consists of a short introduction and then a brief review of the theoretical underpinnings of the concept of equality *in abstracto*. These are followed by a more detailed description of Walzer's theory. It is explained how the theory divides social goods into a series of distributive spheres, and how, by ensuring the autonomy of each of these spheres, Walzer attempts to make certain that no member of a society can unduly monopolize that society's commodities.

The second part of the dissertation is the critical case-study, which consists of four chapters. The first three of these consider the major "suspect" grounds, discrimination upon which is prohibited by EU law; these are gender, nationality and the so-called "Article 13 grounds" (race, religion, age, disability and sexual orientation). The fourth chapter looks at semi-suspect and non-suspect grounds. In each section, a sample of the ECJ's case-law is analysed in the light of, firstly, Aristotelian equality, and secondly, complex equality.

The third part of the dissertation provides an opportunity to reflect upon some of the common themes emerging from the case-law, and to weigh up the advantages and disadvantages of complex equality as a possible complement to Aristotle.

Table of Contents

1. Introduction

1.1. Thesis

Michael Walzer's theory of complex equality could be used by the European Court of Justice when dealing with cases concerning equality, as a complement to the Aristotelian "test" that likes should be treated in like fashion and unlikes in unlike fashion.

1.2. The trouble with Aristotle: A précis

In his *Nicomachean Ethics*, Aristotle declared:

> *"[T]he origin of quarrels and complaints [is] when either equals have and are awarded unequal shares, or unequals equal shares."*[1]

Many courts of law around the world have adopted this principle, or at any rate its underlying logic, in dealing with present-day "quarrels and complaints". The principle is usually restated in a slightly elongated form, such as:

> *"[C]omparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified".*[2]

The European Court of Justice, from a judgment of which this version is taken, usually refers to this as Community law's "general principle of equality" which is used by the Court (inter alia) to review national rules which fall within the scope of the EC Treaty.[3] However, in the fifty years since the general principle was

[1] Aristotle, *The Nicomachean Ethics* (OUP, Oxford 1980), trans. WD Ross, 112 (Book V, Chapter 3). He made the same point (although sometimes with different wording) on other occasions.
[2] This exact wording taken from Case C-56/94 *SCAC Srl v Associazione dei Produttori Ortofrutticoli* [1995] ECR I-1769, para. 27.
[3] Equality's original role in EU law was as a driver for market integration. More recently, equality has been set free from the purely economic concerns of the single market to develop into a free-standing, autonomous fundamental right. This process has been described fully in other works. See N Bernard, "What are the purposes of EC discrimination law?" in J Dine and B Watt (eds), *Discrimination Law: Concepts, Limitations and Justifications* (Longman, London and

first invoked[4], the ECJ's handling, or indeed mishandling, of it has provoked confusion among practitioners, dismay among litigants, and quite often anger among critics.

It must be stressed at the outset that it is not the intention of this dissertation to repeat work already done by others. The critique of Aristotle, the test named after him, and the myriad problems which its use has caused and continues to cause in equality litigation at the ECJ (and other courts), has been prolonged and thorough; there is little or nothing to add.[5] The failure or at least partial failure of Aristotle's like-for-like test is almost universally acknowledged, and its flaws and inconsistencies need only the briefest summary here.

In the field of gender discrimination, for example, two situations have been regarded as *both* comparable *and* different from one case to the next.[6]

New York 1996); G de Búrca, "The Role of Equality in European Community Law" In Alan Dashwood and S O'Leary (eds), *The Principle of Equal Treatment in E.C. Law* (Sweet & Maxwell, London 1997); A Evans, "Union Citizenship and the Constitutionalization of Equality in EU Law" in M La Torre (ed), *European Citizenship: An Institutional Challenge* (Kluwer, The Hague 1998). Also useful on this point is S Fredman, "The Age of Equality" in S Fredman and S Spencer (eds), *Age as an equality issue: legal and policy perspectives* (Hart, Oxford 2003) 43.

[4] The first use of the principle is thought to have been in Case 1/54 *French Republic v High Authority of the European Coal and Steel Community* [1954-1955] ECR 1, at 8. However, the caveat concerning objective justification did not become an explicit component of the "test" until 1977: Joined Cases 117/76 and 16/77 *Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co. v Hauptzollamt Hamburg-St. Annen ; Diamalt AG v Hauptzollamt Itzehoe* [1977] ECR 1753.

[5] In terms of books, and in the specific context of the ECJ, the reader is referred first and foremost to the two leading works, by Ellis and Bell: E Ellis, *EU Anti-Discrimination Law* (Oxford EC Law Library, OUP Oxford, 2005); M Bell, *Anti-Discrimination Law and the European Union* (Oxford Studies in European Law, OUP, Oxford 2002). However, see also (for example) Dagmar Schiek, Lisa Waddington and Mark Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Ius Commune Casebooks for the Common Law of Europe, Hart Publishing, Oxford 2007), as well as the many learned articles referenced in this dissertation; a good starting point would be the works cited immediately below, notes 13 to 21 inclusive.

[6] For example, the situation of a man suffering an illness and the situation of a woman suffering a *pregnancy-related* illness. These two situations were held to be comparable in Case C-179/88 *Handels- og Kontorfunktionaerernes Forbund i Danmark [Acting for Birthe Vibeke Hertz] v Dansk Arbejdsgiverforening [Acting for Aldi Marked K/S]* [1990] ECR I-3979 and in Case C-400/95 *Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Helle Elisabeth Larsson v Dansk Handel & Service, acting on behalf of Føtex Supermarked A/S* [1997] ECR I-2757. However, they were held to be *different* in Case C-394/96 *Mary Brown v Rentokil Ltd.* [1998] ECR I-4185 and in Case C-66/96 *Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Berit Høj Pedersen v Fællesforeningen for Danmarks Brugsforeninger and Dansk Tandlægeforening and Kristelig Funktionær-Organisation v Dansk Handel & Service* [1998] ECR I-7327. The matter is discussed further at section 3.4. below. Another example would be the situation of a part-time worker and the situation of a full-time worker. These two situations were held to be different in Case 170/84 *Bilka - Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607, but *comparable* in Joined Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and

Furthermore, the Court has been able to classify the alleged discriminator's behaviour as *both* different treatment *and* identical treatment, depending solely on how it chose to phrase this behaviour[7], or whether it chose to take into account or ignore certain details[8]. Even within one and the same case, the Aristotelian "test" for equality is often able to produce more than one result. That a case of "likes being treated in like fashion" is not a case of "unlikes being treated in unlike fashion", is frequently little more than a question of how closely the people or entities are inspected[9], and a case of likes being treated in unlike fashion, but for an objectively justifiable reason, could on many occasions be

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C-78/93 *Stadt Lengerich v Angelika Helmig and Waltraud Schmidt v Deutsche Angestellten-Krankenkasse and Elke Herzog v Arbeiter-Samariter-Bund Landverband Hamburg eV and Dagmar Lange v Bundesknappschaft Bochum and Angelika Kussfeld v Firma Detlef Bogdol GmbH and Ursula Ludewig v Kreis Segeberg* [1994] ECR I-5727. The matter is discussed further at section 3.6. below.

[7] For example, the case-law on pensions in the UK, where a number of different companies granted pensions or pension-related payments in a way that could not help but reflect the unequal retirement ages, as between men and women, in the UK at that time. In the *Burton* case, the Court used a *relative* formulation in describing British Rail's behaviour; it was then able to conclude that, as between male and female workers, this had been an instance of *identical treatment*: Case 19/81 *Arthur Burton v British Railways Board* [1982] ECR 554. But in the *Birds Eye Walls* case, the Court used a *non-relative* formulation in describing Birds Eye Walls' behaviour; it was then able to conclude that, as between male and female workers, this had been an instance of *different treatment*: Case C-132/92 *Birds Eye Walls Ltd. v Friedel M. Roberts* [1993] ECR I-5579. The matter is discussed further at section 3.5. below.

[8] For example, the case-law on positive action, and a number of cases concerning the rules governing job applications. In the *Kalanke* case, a rule whereby, in a tie-break situation, all female candidates would be given automatic precedence was held to be, as between men and women, different treatment: Case C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051. However, in the *Marschall* case, an almost identical provision, but with a "saving clause" allowing a male candidate the possibility of pleading "specific" reasons why he should be accorded precedence, was held to be, as between men and women, identical treatment: Case C-409/95 *Hellmut Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363. Clearly, in the *Marschall* situation, the male candidate is still at a disadvantage; he would need a "specific" reason to have a chance of surviving the tie-break, while a female candidate would not. But the Court seized on the "saving clause", arguably giving it much more importance than it deserved, in order to equalize the situations of the two candidates. This was clearly for political reasons; the *Kalanke* decision had been very unpopular, and the Court did not want to have to outlaw a second "positive action" measure. The matter is discussed further at section 3.7. below.

[9] For example, in the field of nationality discrimination, the case of *Vigier*: Case 70/80 *Tamara Vigier v Bundesversicherungsanstalt für Angestellte* [1981] ECR 229. This could be a case of the same law applying to two victims of persecution ("likes being treated in like fashion"), or, if one takes into consideration the facts, firstly, that one of these has paid a contribution to a certain German institution while the other has not, and, secondly, that the one *can* gain retroactive admission to an old-age insurance scheme while the other *cannot*, it could be a case of the same law applying in *two different ways* to *two different types* of persecution-victim ("unlikes being treated in unlike fashion"). The matter is discussed further at section 5.4.2. below. As Isiah Berlin puts it, "unequal treatment of various members of class A can always be represented as equal treatment of them viewed as members of some other class B": I Berlin, "Equality as an Ideal" in FA Olafson, *Justice and Social Policy: A collection of essays* (Prentice-Hall, Englewood Cliffs 1961) 130.

read as a case of *unlikes* being treated in unlike fashion, if the objective justification is, as it were, front-loaded.[10]

But aside from these dry and somewhat technical problems with the Aristotelian test, there is another, bigger problem, for the explanation of which a distinction is usually drawn between "formal" and "substantive" equality.[11] It is felt that Aristotle's test, with its love of bisection and its inability to see special cases or to admit of exceptions, suffers from an excess of *formality*, so that the results it produces do not correspond with actual, real-world equality (or so-called *substantive equality*).[12] Put another way, the test cannot differentiate between situations. A woman, for example, may wish to be treated *unlike* her male colleagues when it comes to a benefit such as paid maternity leave, but *like* them in all other respects of workplace life. A disabled person might wish to be treated *like* his fellows in, say, a job interview, but *unlike* them (should the situation arise) in terms of prison conditions[13]. The "equality" produced when the Aristotelian test fails to differentiate between these situations may be equality in form, but it is not equality in substance.[14] The phenomenon whereby the same person would wish for their differences to be disregarded in one context, but taken into account in another, in order to achieve equal treatment in both, has been described as the "dilemma of difference"[15]. It is a dilemma on the horns of which the Aristotelian test is severely impaled.

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[10] For example, Joined cases C-27/00 and C-122/00 *The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd (C-27/00) and Omega Air Ltd , Aero Engines Ireland Ltd and Omega Aviation Services Ltd v Irish Aviation Authority (C-122/00)* [2002] ECR I-2569, and Case T-48/89 *Fernando Beltrante and others v Council of the European Communities* [1990] ECR II-493. The former case is discussed further at section 6.3.1., and the latter case at section 6.3.3., below.

[11] This "bigger problem" concerns only equality cases involving *human* comparators.

[12] Some critics condemn only the first limb of the Aristotelian test (likes to be treated like) as formalist, preferring to see in the second limb (unlikes to be treated unlike) the beginnings of a substantive approach; see, for example, C Tobler, *Indirect discrimination : a case study into the development of the legal concept of indirect discrimination under EC law* (Intersentia, Antwerp 2005) 25 et seq. Many others, however, regard the entire test as excessively formal, and substantive equality as something entirely different. This is the position adopted in this dissertation.

[13] See G Moon and R Allen, "Dignity discourse in discrimination law: a better route to equality?" 2006 EHRLR 6, 610, for further discussion of this example. As Bell and Waddington succinctly put it, the "[c]overed ground is sometimes relevant": M Bell and L Waddington, "Reflecting on inequalities in European equality law" (2003) 28 ELRev 349, 360.

[14] For one among the very many who have looked at the formal/ substantive equality problem, see PA Cain, "Feminism and the limits of equality" 24 Ga L Rev 1989-1990, 803.

[15] D Schiek, "A New Framework on Equal Treatment of Persons in EC Law?" European Law Journal, v. 8, n. 2, June, 290, 310. Schiek attributes the phrase to Martha Minow. The phenomenon is also referred to simply as the sameness/ difference debate.

In respect of its equality case-law, Carey has said that the European Court of Justice is incoherent, and criticized its "illogical application of tests"[16]. Holtmaat and Tobler describe the Court's approach as "misguided"[17]. Prechal talks of "methodologically puzzling" approaches and "mixed messages"[18], and Somek of "interpretative liberties"[19]. The Court has also been repeatedly decried as inconsistent[20]. The ECJ's currency as an arbiter in equality matters becomes devalued as a result of these criticisms.

Under these circumstances, the Aristotelian test becomes little more than a figleaf for the Court's own view of what is or is not equal. As More has put it,

> *"a court can achieve any result it chooses by simply changing the measure it uses"*[21].

Aristotle's cruel callipers are widened or narrowed at the whim of the person holding them; measurements are taken and lines drawn. If the litigant is lucky, these lines will be drawn so accurately that they will delineate perfectly the relative positions of him[22] and his fellows. If the litigant is unlucky, one of the

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[16] N Carey, "From obloquy to equality: in the shadow of abnormal situations" Yearbook of European Law 2001, n. 20, 79, 99.

[17] R Holtmaat and C Tobler, "CEDAW and the EU's Policy in the Field of Combating Gender Discrimination", Maastricht Journal of European and Comparative Law, 2005, v. 12, n. 4, 399, 416. This was in the particular context of Case C-220/02 *Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v Wirtschaftskammer Österreich* [2004] ECR I-5907.

[18] Sacha Prechal, "Equal Treatment, Non-Discrimination and Social Policy: Achievement in Three Themes" (2004) 41 CMLR 533, 537, 543 and 538.

[19] A Somek, "Solidarity Decomposed: Being and Time in European Citizenship" 2007 ELRev 32(6), 787, 801.

[20] Christopher Brown, "The race directive: towards equality for "all" the peoples of Europe?" Yearbook of European Law 2001-2002, n. 21, p. 195-227, 205 ("Indirect discrimination is, however, a rather sensitive issue, and one which has not received consistent interpretation by the European Court of Justice"); TK Hervey and J Shaw, "Women, work and care: women's dual role and double burden in EC sex equality law", Journal of European Social Policy, Vol. 8, No. 1, February 1998, 43, 47 ("there remains a sufficient degree of inconsistency in the interpretations which the Court of Justice has given over the years"); H Meenan "Introduction" in Meenan (ed), *Equality Law in an Enlarged European Union* (CUP, Cambridge 2007) 3, 11 ("[The] development [of equality and non-discrimination] has been… lacking in uniformity"); J Calderón and A Baez, "The *Columbus Container Services* ECJ Case and Its Consequences: A Lost Opportunity to Shed Light on the Scope of the Non-discrimination Principle", Intertax, Vol 37, Issue 4, 212, 216 ("the real problem is not about lack of rulings but about lack of consistency in the case law"); J Schwarze, *European Administrative Law* (Revised 1st Edition Sweet & Maxwell, London and Office for Official Publications of the European Communities, Luxembourg, 2006) 564 ("Not all the Court of Justice's decisions have applied these criteria consistently and logically, however").

[21] More, ""Equal Treatment" of the Sexes in European Community Law: What Does "Equal" Mean?" (1993) 1 Feminist Legal Studies 45-74, at 51.

[22] Gender-neutral.

lines will be drawn on the wrong side of him (principally because the measurer cannot *see* him), forcing him and his fellows into a patently false opposition on one side and/or a patently false kinship on the other. It is hard not to be reminded of the movement of counters in a board game, Snakes and Ladders, for example. Those making use of the Aristotelian test employ a strange left-or-right, up-or-down mentality, which seems to see people in two dimensions rather than three.

But an overly pliable test can quickly become vulnerable to abuse by judges, spurred on by extraneous political, or even non-political, concerns. Worse still, equality, now owing its existence merely to judicial whim, can be portrayed by its enemies as nothing more than a deceptive slogan[23], fit for discontinuation, if not abolition.

A unified, easy-to-use theory of equality for EU law, while desirable, is not plausible. There are too many justiciable fields of endeavour inhabited by today's Union, each with its own particular nuance, inevitably affecting what goes on, including how equality is viewed, within the field.[24] Besides, the requirement to treat likes in like fashion, and unlikes in unlike fashion, is itself an across-the-board rule, its very universality stretching it until all meaning is lost, with the results described above. What is needed is a system which is capable of taking into account each field's unique qualities. It is submitted that Michael Walzer's "complex equality", or at least a variation thereon, would fit the bill.

1.3. The project in outline

The aim of the project is to investigate, via a critical case-study, whether Walzer's theory could act as a credible complement to Aristotle for the Court of Justice, when dealing with cases on equality. It is a library-based dissertation, very much doctrinal in nature ("black-letter law"). It is a contribution to the existing literature on equality in the ECJ's case-law, with the difference that it

[23] This is how Lenin saw it: Vladimir Il'ich Lenin, *The deception of the people by the slogans of equality and freedom* (Lawrence and Wishart, London 1940).

[24] As Bernard puts it, "Even when the non-discrimination principle apparently focuses on the same "evil", as in cases on discrimination on the grounds of nationality, it may in fact cover very different purposes, each with their own internal logic": N Bernard, "What are the purposes of EC discrimination law?" in J Dine and B Watt (eds), *Discrimination Law: Concepts, Limitations and Justifications* (Longman, London and New York 1996) 98.

makes a tentative suggestion as to how improvements might be made in the future.

After a brief consideration of the theoretical underpinnings of equality, Walzer's theory is set out in detail in Chapter 2. The next four chapters constitute a case-study, with the Court's jurisprudence in different cases examined first from the Aristotelian, and then from the Walzerian point-of-view. Chapter 7 provides an opportunity to reflect on some of the common themes emerging from the case-law. In Chapter 8, some problems to do with the use of a Walzerian-style "Forum" are considered, and an alternative theory – Mediated Complexity – is put forward. In Chapter 9, a final evaluation is undertaken as to whether complex equality, or mediated complexity, might serve as a possible complement to Aristotle.

The purpose of the case-study is to consider the Court's decisions both as they are, and as they might be under a Walzerian regime. In the cases of gender and the "Article 19" grounds[25], a number of cases on a given topic are summarized before Walzer's theory is applied to them in a separate section. It is felt that, in these areas where the Aristotelian analysis *itself* raises a large number of issues and polemics, often spanning an entire sequence of decisions, it is better to separate the two analyses. However, in the cases of nationality and the semi-suspect and non-suspect grounds, an attempt has been made to integrate the two types of analysis to some degree, as it is felt that this can be done without undue confusion, allowing the argument to flow more smoothly. Even in those chapters, though, the basic order – Aristotle first, Walzer second – is for the most part still observed. Only in Chapter 9 is a case analysis undertaken wherein the two theories are considered, as it were, simultaneously.

A few words are perhaps required about the parameters of the project. Needless to say, of the thousands of decisions handed down over five decades by the European court, only a representative sample can be used, in any one section, to illustrate the points being made; where there is a choice, however, an attempt is made to make use of the Court's more recent judgments, in order to keep the arguments up-to-date and also to avoid unnecessary repetition of the choices made by earlier writers. Due to pressure of space, certain interesting

[25] So named after Article 19 TFEU – prior to the entry into force of the Treaty of Lisbon on 1 December 2009, this was Article 13 EC.

aspects of EU law in which the principle of equality also plays a role have regrettably had to be omitted. Consequently, the dissertation contains no discussion of Article 110 TFEU (formerly Article 90 EC, on internal taxation imposed on foreign and domestic products), or of price discrimination within the context of Article 102 TFEU (formerly Article 82 EC). However, other forms of discriminatory taxation are looked at in Chapter 5 (on nationality discrimination), and competition law, albeit a different aspect, is represented in Chapter 6 (on semi-suspect and non-suspect grounds).

It must be emphasised that, in this dissertation, Walzer's theory is being mooted solely as a possible new arrow for the judicial quiver. An entirely new, Walzerian society is not being called for. Walzer's *own* project may have been to "describe a society"[26], but that does not prevent his theory being applied in more specific, discreet contexts[27].

Another important point that must be made is that, as Walzer's theory turns on the *shared meanings* of goods arrived at by the relevant *distributive communities*, none of the meanings which are suggested in the course of the dissertation are intended to be *final*, and by extension none of the outcomes which are postulated should be read as being the outcomes which would *definitely* be arrived at if a Walzerian system were put in place. The suggested meanings, and postulated outcomes, are discursive only; other meanings and outcomes are entirely possible. The final decision would be that of the distributive community.[28] Throughout the analysis, and almost at the risk of monotony, a similar caveat to this one is given before a meaning is proposed; sometimes the expression *"Standard Contingent Reply"* is used as shorthand for the fact that the meaning cannot be known until the distributive community makes it known.[29] Where assumptions are made about what the meaning would be – and they are made fully consciously – this is simply to drive the argument forward. Alternative meanings and outcomes – where considered interesting – are given, but it must be appreciated that there could never be room to give them all. Some goods have an almost infinite number of possible meanings; to

[26] M Walzer, *Spheres of Justice – A Defense of Pluralism and Equality* (Basic Books, New York 1983) xiv (hereinafter referred to as *Spheres of Justice*).
[27] See the long list of such applications at the beginning of Chapter 2.
[28] At least under the orthodox theory; an alternative theory, "Mediated Complexity", wherein the final decision is left to the Judge, is proposed in Chapter 8.
[29] See below, Chapter 3, section 3.2.

consider every one, and the outcomes that each would lead to, would be an impossible task, and would make for extremely tedious reading. However, it must be stressed that at no point is the intention to "speak for" other persons, groups or communities.

Finally, a small mention should be made of the problem of indirect discrimination. Whether indirect discrimination is covered by the Aristotelian test *at all* is an unresolved issue, but, for the purposes of this dissertation, it is. To put it another way, the second limb of the test (unlikes treated like) is taken to be a formulation, albeit a very rough one, of the idea of indirect discrimination, whereby identical treatment is applied to two or more parties who are, *in fact*, differently situated, with the result that the identical treatment *in fact* affects them differently. However, whether Aristotle's test is regarded as a failure with respect to indirect discrimination for the "traditional" reasons (difficulties in identifying the comparators, problems of establishing sameness, and so on), or whether it is regarded as a failure with respect to indirect discrimination for *not covering the concept at all*, is really only a detail. The main issue, for the purposes of this dissertation, is whether Walzer's method can overcome the failure, producing better and more consistent results for those to whom the discrimination relates.

Of the great physicist George Gamow it was said,

> *"Even when he's wrong, he's interesting."*[30]

The reader of this dissertation is urged to adopt a similar attitude towards Walzer. What is offered here is food for thought. If the theory is flawed, or even out-and-out "wrong", either in and of itself or as applied to the ECJ's equality case-law, then it is at least interesting. If it is felt to be unhelpful in one area – gender discrimination, for example – then it may still be of interest in another. If it is thought to be inoperable in practice, either in its pure form or in the less cumbersome alternative version – Mediated Complexity – discussed in Chapter 8, then it may at least inspire, or embolden. Furthermore, it is hoped that its presentation here might kickstart a much-needed discussion, which in turn might

[30] Gamow's important role in particle physics is described in *Atom*, a BBC series produced by Paul Sen and presented by Jim Al-Khalili, 2007, from which this assessment of Gamow – by his contemporaries – is drawn.

pave the way towards a future theory which does "work". Above all, what is presented here is not intended to be a replacement for the Aristotelian test, but at most a complement, or perhaps less even than that: a mere tool, of the many, in the ECJ judges' tool-box. Ideally, it should not simply be confirmed as "right" or condemned as "wrong"; this belittles the exercise. A complement for a 2,300-year-old test is unlikely to be found overnight.

1.4. The search to find a complement

1.4.1. The difficulty

In searching for a potential complement to Aristotle for the European Court of Justice, one is confronted by a dizzying array of equality theories; rather like Pablo Neruda's critics, theorists have effectively stabbed equality with nibs and drowned it in ink.[31]

One theorist may be ruled out of the search at a fairly early stage, though, and that is Karl Marx. Article 120 of the Treaty on the Functioning of the European Union (formerly Article 98 of the Treaty of Rome) declares that "[t]he Member States and the Union shall act in accordance with the principle of an *open market economy*" (emphasis added). The phrase is also used at Articles 119(1) TFEU and 119(2) TFEU[32]. The open market economy is naturally at odds with the marketless economy envisaged by Marx.[33] Thus, prima facie, for the Court's judges to adopt a Marxist approach to equality would not be in keeping with the European project overall. Such an approach might not even be possible, as cases usually only involve one or two individuals, and it would be hard to apply Marxist principles on such a small scale. Nevertheless, if it were possible, commentators would no doubt argue that this was "the thin end of the wedge", and would wonder why the ECJ, like a turkey voting for Christmas, had decided to advocate an adjudicatory method which would in the long run lead to the unravelling of the entire Union.

[31] See Pablo Neruda, "Oda a la crítica".
[32] Formerly Articles 4(1) EC and 4(2) EC.
[33] This has led one commentator to talk of "the hard-wiring of neo-liberal policies into the EU": AT Callinicos, *Equality* (Polity Press, Cambridge 2000) 107.

Meanwhile, at the other end of the political spectrum, the outlook is no less severe. The famous "libertarian" vision of Robert Nozick holds freedom to be considerably more important than equality. It is hard to believe that there would even be nation states (in the traditional sense) in Nozick's world, still less a multi-State entity like the EU. He envisions a "framework" of entirely voluntary "communities", which will "wax and wane"[34]: "[S]ince any… community may be established within the framework, it is compatible with all particular utopian visions, *while guaranteeing none*"[35]. Community members are free to enter and leave communities as they wish, or indeed start their own. Such central authority as there is would be a protective association, and nothing more. No "paternalistic restrictions"[36] may be imposed, and enforced redistribution between communities is also forbidden: "none have the right to impose their vision of unity upon the rest"[37]. Under these circumstances, it again appears that the ECJ judges would be to say the least shooting the European project in the foot if they endorsed a Nozickian *modus operandi*.

What does that leave? The situation is reminiscent of that in economics, where some favour one hundred percent regulation, à la Marx, while others favour hardly any regulation at all, à la Friedman. Reality forces most States into some sort of compromise-position between the two. Competition law, of which the EU has perhaps fittingly become something of a standard-bearer, is an example of how this works on a day-to-day basis: there is little or nothing to stop innovators setting up companies and prospering, but as they grow bigger and bigger, increased regulation is brought to bear on them in order to give the other runners in the race a "fair chance"[38].

Is there a similar mid-way point for equality? One could argue that a very small example might be inheritance tax: there is nothing to stop individuals prospering and thus creating disparities of wealth within their communities but, on their deaths, the State acts to redress the balance slightly by taking a share of the estate for itself. Given the wide disparities of wealth in evidence in today's society, it could be argued that this measure hardly makes any difference at all.

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[34] R Nozick, *Anarchy, State, and Utopia* (Basic Books, New York 1974) 312.
[35] Ibid., 320 (emphasis added).
[36] Ibid., 324.
[37] Ibid., 325.
[38] A chance which Friedman and the Chicago School hold is undeserved, if not positively unfair on the market-leader!

More extreme is the biblical Sabbatical, mentioned favourably by Walzer, which required land to be returned to its original owner after fifty years.[39] This was undoubtedly a more drastic plan, effectively sending everyone back to square one after a half-century, but it has also been described as a "utopian plan that never was put into practice"[40].

However, to find a half-way house should involve more than just locating the middle of the continuum-of-regulation. What Marx and Nozick highlight is the ongoing battle between *equality and freedom*, with Marx's socialists being one hundred percent equal but not particularly free, and Nozick's libertarians being (almost) one hundred percent free, but not in the least bit equal.

1.4.2. Equality versus freedom

In Aldous Huxley's *Brave New World*, the point was made that excessive standardization actually leaves some people unhappy. Robbed of their ability to live an individualistic way of life (however that may have expressed itself), these people are in a very real sense *less free*. Thus, opponents of egalitarianism are sometimes called libertarians, or hyperindividualists. The elimination of individualism poses a very difficult, and dangerous, problem for equality theorists. As Vlastos puts it,

> *"If A is valued for some meritorious quality, m, his individuality does not enter into the valuation. As an individual he is then dispensable; his place could be taken without loss of value by any other individual with as good an m-rating."*[41]

This reasoning (which, it must be pointed out, is by no means Vlastos' conclusion, or even close to it) could have come straight out of Huxley's "World". Indeed, the Director of Hatcheries and Conditioning at one point declares:

> *"Murder kills only the individual – and, after all, what is an individual? [...] We can make a new one with the greatest ease – as many as we like."*[42]

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[39] Leviticus, Chapter 25, Verses 8-10.
[40] Lieber, *Etz Hayim: A Torah Commentary* (Jewish Publication Society of America, 2001) 738.
[41] G Vlastos, "Justice and Equality" in Richard Brandt (ed), *Social Justice* (Prentice Hall, Englewood Cliffs, NJ 1962) 31, 44 (Vlastos' emphasis).
[42] Aldous Huxley, *Brave New World* (Vintage, 2004) 128.

Other theorists recognize the conflict between equality and freedom, but appear to see freedom as the source of the trouble, not equality:

> *"Equality lays down how we are to treat people: but Liberty entitles us to act as we choose, not as some rule lays down. If I have any Liberty then there are some decisions I am allowed to make on my own; I am free in some cases to act arbitrarily. And if that is so, I may in such cases arbitrarily choose one person rather than another, without there being any ground to justify discrimination. [...] This is what it is to be free. Freedom is inherently unfair."*[43]

The tussle between the two concepts is probably as old as philosophy itself.[44] Theorists such as Matson note how the traditional settlement between the two ideas usually takes the form of an "agreement"[45] (some variant on the Rousseauian *social contract*), which in most societies replaces the anarchic system, so famously summed up by Hobbes, which is very much based on the notion that "might is right" (maximum freedom, minimum equality). The contract[46] demands a surrender of freedom (or "sovereignty"[47]), in return, principally, for a guarantee of security. However, a side-effect of the newly-secure society will of course be that its citzens can now cohabit peacefully, the mighty alongside the weak, the clever alongside the foolish, and so on. The contract thus balances the loss of freedom with a gain in equality, at least in the short term. But "might is right" creeps back into play in new, disguised ways, and this balance is quickly imperilled once again. Contractualism on its own cannot therefore be the answer.

Theorists like Dworkin[48], Arneson[49] and Williams[50] have investigated solutions involving complicated redistributions (even of abstracts like intelligence) and

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[43] JR Lucas, "Against Equality" [1965] XL Philosophy 296, 307.

[44] Tocqueville believed that equality and freedom were "two different things": GE Bevan (tr), *Alexis de Tocqueville: Democracy in America* (Penguin Classics, 2003) 584. But cf. Laski, who, while acknowledging the latter's view that the two concepts were "antithetic things", held that this was a "drastic conclusion": Harold J Laski, *A Grammar of Politics* (George Allen & Unwin Ltd., London 1925) 152.

[45] Wallace Matson, "Justice: A Funeral Oration" [1983] I Social Philosophy and Policy 94, 99.

[46] Or its more recent variants, such as Rawls' "principles".

[47] Locke refers to *resigning* one's natural power "into the hands of the community": John Locke, *The Second Treatise of Civil Government* (Basil Blackwell, Oxford 1946) 43.

[48] See, for example, R Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, Cambridge, Massachusetts 2001), which is a compendium of all his writings on equality.

[49] See, for example, Richard J. Arneson, "Equality and Equal Opportunity For Welfare" [1989] 56 Philosophical Studies 77.

rectifications[51], Williams at least spotting the "inhuman"[52] aspect of mixing and matching human characteristics and body parts like a game of dress-up dolls; as in *Brave New World*, extreme equality threatens the annihilation of individuality. Real-life examples also confirm this. The socialism of the Soviet Union, while (supposedly) providing equality of resources, led almost immediately to *exceptional* inequality of power, with a concomitant loss of freedom for those left powerless. As Frankfurt has put it, although without expressing a view on the "merit of this argument", "an egalitarian distribution of money can be achieved and maintained only at the cost of repression".[53]

1.4.3. Reasons for choosing Walzer

In these circumstances, would a half-way house even make any sense? Is there any use in two entities being half-equal? Is someone who is half-free free at all?

It seems to deny reality, though, to lurch from one extreme to the other, demanding either that everyone be entirely free in every circumstance, or that everyone be entirely equal in every circumstance. A more variable approach which judges each situation afresh, and which equalizes only where it is appropriate to do so[54], but lets freedom prevail otherwise[55], would make more sense. Walzer's conception of a world of spheres, rigourously separated one from another, achieves this equilibrium. As he himself has written:

> *"The art of separation doesn't make only for liberty but also for equality… Religious liberty annuls the coercive power of the political and ecclesiastical officials. Hence it creates, in principle, the priesthood of all believers… Academic freedom provides theoretical, if not always practical, protection for autonomous universities, within which it is difficult to sustain the privileged position of rich or aristocratic children. The free market is open to all comers, without regard to race or creed […]; and*

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[50] See, for example, BAO Williams, "The Idea of Equality" in Peter Laslett and WG Runciman (eds), *Philosophy, Politics and Society, Series II* (Basil Blackwell, 1972).

[51] Some of these tales of supposed rectification seem a bit far-fetched and even offensive, particularly where disability is concerned. But for a possible real-life example, see J Clayton, "Running without legs? That's not fair on all the other athletes" *The Times* (London 15 January 2008) 30.

[52] Supra n 50, 130.

[53] Harry Frankfurt, "Equality as a Moral Ideal" [1987] 98 Ethics 21, 22.

[54] Inter-sphere situation.

[55] Intra-sphere situation.

> *though it yields unequal results, these results never simply reproduce the hierarchy of blood or caste or, for that matter, of "merit"… Under the aegis of the art of separation, liberty and equality go together."*[56]

The very fact of the spheres ensures the freedom, but it is their *separation* which ensures the equality. However, as Walzer hints in the quotation above when talking about the market, this is not *simple* equality; within a single sphere, disparities may be perfectly permissible. Whether equality gives way to freedom, or whether freedom gives way to equality, must be determined from the specific context:

> *"[E]ach freedom entails a specific form of equality or, better, the absence of a specific inequality – of conquerors and subjects, believers and infidels, trustees and teachers, owners and workers – and the sum of the absences makes an egalitarian society."*[57]

But, crucially, Walzer's theory provides the means for making this important determination, as will be explained further in the next chapter.

Walzer's spheres, then, rather like those of Shakespeare's time[58], allow for collective harmony while still acknowledging individual variation. Complex equality is thus the *true* half-way house between the two extremes, offering the prospect of a genuine complement for the ECJ without requiring the dismantling of its parent organization, and for these reasons has been chosen over the other available theories as the appropriate one to apply to the problem under consideration.

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[56] M Walzer, "Liberalism and the Art of Separation" Political Theory Vol. 12 No. 3 (Aug 1984) 315, 320-1.

[57] Ibid., 326.

[58] See, for example, *Twelfth Night*, IIIi: "I had rather hear you to solicit that/ Than music from the spheres". It was held that, in their rotations, the crystalline spheres containing the planets and the fixed stars created "a ravishing harmony inaudible to mortal ears": Shakespeare, *Twelfth Night* (The New Cambridge Shakespeare, CUP, Cambridge 1985) 99.

2. Michael Walzer and Complex Equality

2.1. Introduction

Michael Walzer launched his theory of complex equality in 1983 in a book entitled *Spheres of Justice*.[1] The theory, as will be seen, is innovative in that it focuses on *distribution*, where distribution is defined very broadly to include not just tangible goods, but also abstract goods such as rights[2], and even characteristics[3]. Walzer's writing style in *Spheres of Justice* is also innovative; instead of arguing from first principles, he chooses to take a more artistic approach. He produces what some have called a "portrait"[4] (or even an entire "portrait gallery"[5]), others an "impressionist painting"[6]. In this dissertation, Walzer's lead will be followed. The emphasis will be on working through "accounts of distributions" (of which the court reports provide an almost limitless supply), letting these "accounts" (or even "stories", as Walzer puts it) "suggest" any necessary principles for themselves – "stand[ing]… in the city", as it were, rather than "climb[ing] the mountain", interpreting rather than describing[7].

Over the years, Walzer's theory has been applied to a dazzling variety of situations around the world. These include higher education in Malaysia[8],

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[1] M Walzer, *Spheres of Justice – A Defense of Pluralism and Equality* (Basic Books, New York 1983) (hereinafter referred to as *Spheres of Justice*).

[2] McCrudden, in his recent reanalysis of equality, divides the concept into four categories. In the second category, he too envisages rights as distribuends, calling them "prized public goods": C McCrudden, "The new concept of equality" (Paper prepared for the Academy of European Law conference, "Fight Against Discrimination: The Race and Framework Employment Directives" 2/6/03-3/6/03) <http://www.era.int/web/en/resources/5_2341_679_file_en.796.pdf> accessed 14 April 2009.

[3] See section 3.3. below.

[4] NL Rosenblum, "Moral Membership in a Postliberal State" World Politics, Vol 36, No 4 (Jul., 1984) 581.

[5] Ibid.

[6] J Carens, "Complex Justice, Cultural Difference, and Political Community" in D Miller and M Walzer (eds), *Pluralism, Justice, and Equality* (OUP, Oxford 1995), 47.

[7] All quotations from *Spheres of Justice*, supra n 1, xiv.

[8] H Stokke, "Reasonable Discrimination? Affirming Access to Higher Education in Malaysia" 1999/ 2000 Hum Rts Dev YB 189.

affordable housing in the US[9], and children's rights in El Salvador[10]. Complex equality has been used in everything from the practice of paying research subjects for participating in clinical trials[11], to the communication strategies of police officers[12], and from the protection of personal data[13], to the creation of hierarchies of creditors following insolvency[14]. Could the equality strategy of the European Court of Justice (ECJ) be added to this already impressive list? In this chapter, it is intended to sketch the basics of the theory (with due attention paid to the many who have written about it since 1983) and then, towards the end, to begin to consider whether it could be applied to the case-law of the ECJ.

2.2. Complex equality: A thumb-nail sketch

Michael Walzer holds that there is no one single distributive sphere; rather, there are different distributive spheres for different goods. The *first* major tenet of the theory of complex equality is that these spheres must be kept separate.

Within any one of these spheres, the good in question is distributed according to its *shared social meaning*, that is, according to an understanding of what the good means to the society in which the distribution is taking place, such understanding being shared by the members of this society (distributees and distributors alike). A *second* tenet of the theory of complex equality is that these shared social meanings, or shared understandings, must be respected.

Violation of these shared social meanings would occur if a person acquired a good, *not* in conformity with its shared social meaning, but instead by virtue of the prior possession of *another* good, belonging to a *different* sphere. This latter good is referred to in Walzer's lexicon as a *dominant* good. If, having previously

[9] KD Adams, "Can Promise Enforcement Save Affordable Housing in the United States?" 41 San Diego L Rev 2004 643.
[10] K Read, "When Is a Kid a Kid? Negotiating Children's Rights in El Salvador's Civil War" History of Religions, Vol 41, No 4, Essays on the Occasion of Frank Reynolds's Retirement (May, 2002), 391.
[11] JA Anderson and C Weijer, "The Research Subject as Wage Earner" Theoretical Medicine 23: 2002, 359.
[12] Phillip Chong Ho Shon, ""Now You Got a Dead Baby on Your Hands": Discursive Tyranny in "Cop Talk"" International Journal for the Semiotics of Law Vol XI no 33 [1998] 275.
[13] J Van Den Hoven and PE Vermaas, "Nano-Technology and Privacy: On Continuous Surveillance Outside the Panopticon" Journal of Medicine and Philosophy, 32:2007, 283.
[14] C Villiers, "Employees as creditors: a challenge for justice in insolvency law" Comp Law 1999, 20(7), 222.

acquired the dominant good in its proper sphere, a person were to use this good to *tyrannize* (again, Walzer's word) a neighbouring sphere, that is, to gain privileged or even exclusive access to the good or goods in this neighbouring sphere, then complex equality would be vitiated. Put simply, such a person may not use a dominant good to "jump the queue" in a subsequent distribution of an entirely different good. In Walzerian terms, this distribution would be *flawed*. Only where the goods in each sphere are distributed according to their shared social meanings, and *only* according to their shared social meanings, is tyranny (or *dominance*) averted, allowing complex equality to prevail. The prohibition on tyranny, or dominance, is the *third* tenet of the theory of complex equality.

The boundaries of the spheres must therefore be patrolled to avoid what Walzer calls *boundary crossings*, or *blocked exchanges*, wherein a successful recipient of a good in Sphere 1 is able to *convert* his success into automatic (and unwarranted) success in Sphere 2, thus by-passing the distributive process *intrinsic to Sphere 2.* All such convertibility must be eliminated. A given sphere must be *autonomous*, that is, governed, internally, by the distributive rule germane thereto, and no other. The maintenance of the autonomy of spheres is vital to complex equality. It could be said that this is a fourth tenet of the theory of complex equality, but it is, to all intents and purposes, a restatement of the first tenet, described above, namely that spheres must be kept separate.

As long as the boundaries of a sphere are secured against any contamination from neighbouring spheres, any distribution taking place within the sphere, grounded solely on the shared social meaning of the good in question, should be just[15]. Of course there will be winners and losers. Not everyone will receive the same amount of the good, a result which Walzer calls *simple equality*, and which he does not believe to be feasible. The situation in the sphere after the distribution will be at best what Walzer calls *rough* equality. However, it will not be the kind of gross inequality which is so characteristic of modern society. So long as the tenets set out above are adhered to, any inequalities which remain within the sphere will at least be just, that is, they will have come about for the right reasons, and not for the wrong ones; Walzer calls them "small inequalities". Moreover, with dominance having been eradicated, a winner in one sphere will be prevented from going on to claim immediate and unconditional victory in the

[15] In this paragraph, the word "just" is used in the basic sense that Walzer uses this word, that is, "not corrupt".

other spheres. There is no dominant good which can "buy" all of the others. This opens the door for a society of multiple winners, wherein each member can stake a claim for at least some of the successes on offer, in other words, those successes which they have *properly* deserved, or to which they are *properly* entitled. Each person will thus have some share of the benefits and burdens, privileges and chagrins, of the society in which they live. That is complex equality.

A straightforward real-world example would be the sphere of education. Education should be distributed by teachers, to students, in school. This is a fairly uncontroversial "shared understanding" of the meaning of education, although of course other understandings are possible. However, the sphere of education must be protected from spillover from neighbouring spheres, for example, the sphere of money (students gaining advantage by virtue of wealth), the sphere of family (students gaining advantage via the influence of relatives), the sphere of politics (curricula being dictated by certain political factions) or the market economy (multinational corporations sponsoring schoolbooks as a means of "subliminal advertising"). As long as its borders are patrolled and it is kept autonomous, the situation obtaining in the sphere of education should be one of (rough) equality as between, say, student A and student B (although not, of course, as between the students and their teacher). It should also, momentarily anyway, be one of *simple* equality, but, almost as soon as the first lesson is completed, A may well have begun to overtake B *academically*[16]. Indeed, A may leave school with top grades in all subjects, while B attains a bare pass. However, as long as A is prevented from monopolizing his success by converting it into success in all the other spheres[17], then B has at least the chance of succeeding elsewhere. The complex egalitarian rejects a single big triumph by one person, in favour of many small triumphs by different people. With shared understandings respected, spheres constrained, and dominance precluded, complex equality will prevail.

[16] Walzer vehemently disagrees with Dworkin (and, to a lesser extent, Rawls) that individuals do not deserve their natural talents, and that all talents should therefore be artificially distributed among the entire population.

[17] Unless, of course, success in education forms part of the "shared understanding" appropriate to the sphere in question.

2.3. Negative Dominance

Negative dominance is first introduced by Walzer in his chapter on "Hard Work" in *Spheres of Justice*. It builds on the traditional notion of dominance, that is, the power of a good to afford its possessor automatic access to other goods in other spheres. However, while possession of a positively dominant good might entitle its possessor to all, or at least some, of the good things in life, possession of a negatively dominant good brings about quite the opposite result. According to Walzer, such a good:

> *"commonly carries other negative goods in its train: poverty, insecurity, ill health, physical danger, dishonor, and degradation."*[18]

He continues:

> *"poverty [is carried] into the sphere of money, degradation into the sphere of honor, weakness and resignation into the sphere of power."*[19]

A possessor of a negatively dominant good, then, risks becoming "subordinate in all [spheres,] […] defeat in one area so often lead[ing] to defeat in another"[20]. Rather than trying to be the *King* of every kingdom, to borrow Walzer's early metaphor, the possessor of the negatively dominant good is forced to be the *pauper* of every kingdom; the negatively dominant good is not a good luck charm, but a bad luck charm. As Andre more philosophically puts it,

> *"People are complex emotional, social, cognitive wholes, who can find themselves in downward spirals: one failure breeds others. We get discouraged, we lose our footing, we turn away from our friends."*[21]

Later, Walzer himself was to take up the theme of failure:

> *"Failure pursues [excluded men and women] from sphere to sphere in the form of stereotyping, discrimination, and disregard, so that their condition is not in fact the product of a succession of autonomous decisions but of a single systemic decision or of an interconnected set. And for their children, exclusion is an inheritance; the qualities that supposedly produce it are now its products."*[22]

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[18] *Spheres of Justice*, supra n 1, 165.
[19] Ibid., 183.
[20] J Andre, "Blocked Exchanges: A Taxonomy" in Miller and Walzer, supra n 25, 195.
[21] Ibid.
[22] M Walzer, "Response" in D Miller and M Walzer (eds), *Pluralism, Justice, and Equality* (OUP, Oxford 1995) 291. Compare Walzer's use of the word "stereotyping" here, with Mark Bell's

Hervey also writes about exclusion, and, although she is not referring to negative dominance, or to complex equality at all, the "pattern of disadvantage" which she describes is a similar concept:

> *"Members of racial, ethnic or religious (and indeed other) minorities are likely to be over-represented in socially disadvantaged groups. This phenomenon is known as "social exclusion": a process by which access to income and other social benefits or services, such as health protection, housing and education, is restricted, and a pattern of disadvantage, manifesting itself in several interrelated ways, is perpetuated."*[23]

Possession of a negatively dominant good can cause a boundary breach in exactly the same way as possession of a positively dominant good. The only difference, then, is in the likely reaction of the possessors. The declaration that a distribution is defective and must be rerun, this time with their good left "at the door", is likely to make the possessor of a negatively dominant good much happier than it might make the possessor of a positively dominant good.

2.4. The concept of "shared understandings" investigated further

The concept of "shared understandings" is central to the theory of complex equality. All distributions need a *fundamentum distributionis*, or distributive principle, which makes it clear what each recipient should get, and, perhaps more importantly, why. For the complex egalitarian, this must be the shared social understanding of the meaning of the distributed good. Any distribution grounded on anything other than the shared social understanding of the meaning of the distributed good will be invalid. Thus it is absolutely essential to the theory that this understanding is determined correctly.

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reference to breaking down stereotypes quoted in the section on age (within the subsection entitled, "A Walzerian Analysis") in Chapter 4, below. An assumption made about somebody, or a class of people, can be *one kind* of negative dominant, following that person, or that class of people, from sphere to sphere, and jeopardizing their chances of success in each.

[23] Hervey, "Putting Europe's House in Order: Racism, Race Discrimination and Xenophobia after the Treaty of Amsterdam" in O'Keeffe and Twomey (eds), *Legal issues of the Amsterdam Treaty* (Hart Publishing, Oxford 1999) 333.

Some critics have focused merely on the *logistics* of this determination. If there is to be a debate, who should participate? Where should it take place, and when? This type of criticism will be considered presently.

Meanwhile, other critics have questioned Walzer's entire premise that every social good indicates its own distributive principle, and that the shared understanding can be discerned from the good almost as easily as, say, a robber can be identified by his finger-prints. To put it in Walzer's own words,

> *"If we understand what it is, [and] what it means to those for whom it is a good, we understand how, by whom, and for what reasons it ought to be distributed."*[24]

This *implies* that that there is one understanding to every one good. Naturally, many commentators have protested about this, claiming that there can be two, or even several, understandings to one good.[25] Others go further and argue that this is not just another perspectivist point, in other words, that the good means different things to different people, but that even one and the same person might understand one good in two (or more) ways.[26] Further, these understandings need not be mutually exclusive, but may well co-exist. Still others restate the argument in terms not of understandings but of spheres, that is, that one good may find itself in two distributive spheres, depending on the identity of the potential recipients.[27]

It is perplexing that these critics indict such a differentiated theory on a charge of being too uniformitarian ("one understanding to one good"). It is submitted that Walzer's theory can quite easily accommodate multiple meanings, for multiple recipients. Walzer himself arguably entertained the idea of one good having two

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[24] *Spheres of Justice*, supra n 1, 9.

[25] A Gutmann, "Justice across the Spheres" in D Miller and M Walzer (eds), *Pluralism, Justice, and Equality* (OUP, Oxford 1995) ("the social meanings of some goods are multiple" on p 99); Margo Trappenburg, "In Defence of Pure Pluralism: Two Readings of Walzer's *Spheres of Justice*" The Journal of Political Philosophy, Vol 8, No 3, 2000, 343 ("sometimes different principles are used to distribute one particular social good" on p 345; "social goods have multiple or ambivalent meanings" on p 346).

[26] M Rustin, "Equality in Post-Modern Times" in Miller and Walzer, supra n 25, giving health-care and wealth as examples of goods with a double-meaning; Macdonald gives love as his example: RA Macdonald, "Access to Justice and Law Reform" 10 Windsor YB Access Just 287, 333.

[27] RB Thigpen and LA Downing, "Liberal and Communitarian Approaches to Justification" Review of Politics, 51:4 (1989: Fall) 533 (again giving medical care as an example). Mayer gives education and membership (inter alia) as his examples: R Mayer, "Michael Walzer, Industrial Democracy, and Complex Equality" Political Theory, Vol. 29 No. 2, April 2001, 237, 245-246.

understandings in *Spheres of Justice*, where he described *territory* as being "a social good in a double sense"[28], representing two different things to two different sets of people. And he certainly entertained the idea twelve years later, when he gave the example of *soup*, which would mean one thing, and therefore be distributed in one way, to one group of people, in the *grocery store*, and would mean another thing, and therefore be distributed in another way, to another group of people, in a *soup kitchen*.[29] He confirmed that the theory had no trouble, as a consequence, splitting soup into two different distributive spheres.

Returning to the question of logistics, just how should the shared social understandings (of the meanings of distributed goods) be determined? What would such a determination look like? It is sometimes hard to picture exactly what Walzer has in mind here – some kind of meeting of villagers in a village hall, perhaps, or a gathering of citizens in the Roman Forum. Should a mass show of hands be used for the taking of decisions, as on the Pnyx hill in ancient Athens? Walzer himself makes no pretence of the fact that he is more concerned with the theory than the practice:

> *"I won't try to describe how we might go about creating such a society. The description is hard enough"[30].*

In what follows, the word "debate" will be used to describe the determination process. However, there is nothing significant about the choice of this particular word, and no special meanings should be read into it. The location of the debate will be given as "forum", but subject to the same caveat. Perhaps the most important thing to remember is that, since the shared understandings change from society to society[31], it makes sense that the precise style of the debate, as well as the nature of the forum, will also change from society to

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[28] Supra n 1, 44.

[29] M Walzer, "Response" in Miller and Walzer, supra n 25, 282. See also Walzer's comment, made during an exchange of views which he conducted with Dworkin shortly after the publication of *Spheres of Justice*, that "[i]t is entirely possible, on my view, that for some goods we will have complex rather than unitary distributive principles": M Walzer and R Dworkin, "Spheres of Justice: An Exchange" New York Review of Books 30/12 (July 1983), 43, 44.

[30] Supra n 1, xiv. And see B Barry, "Spherical Justice and Global Injustice" in Miller and Walzer, supra n 25, at 77: "Walzer resolutely refuses to investigate the micro-processes that go into the formation and sustenance of beliefs".

[31] In the sense in which that word is used in the second paragraph of section 2.2., that is, the society *in which the distribution is taking place*. One could also call this the *distributive community*.

society. But as well as questions of *how* and *where*, it is also necessary to consider questions of *who*. Who should be present at the debate? What characteristics do they need? How are they to be treated, both during and *after* the debate? Questions of *when*, or at least *how often*, will also crop up.

If the intention is to design a procedure for ascertaining the shared social meaning of a good, and it is accepted, as discussed above, that goods have multiple meanings, then it follows that said shared social meaning will[32] only be able to be ascertained via some form of deliberation, wherein the various proposed meanings are put forward, and then weighed up as to their relative merits. The deliberation would end with the meaning considered best being selected. Since it is the *social* meaning that is required, that is, the "understanding of what the good means to the society in which the distribution is taking place"[33], it follows *prima facie* that all members of the society should be invited to the deliberation, and given a chance to propose meanings, and also *prima facie* that all members of the society should participate in the final selection. An examination of the many and varied types of democracy, not to mention the many and varied electoral systems, is of course beyond the scope of this dissertation. But the society in question would obviously have to settle on a particular type, and on a particular system, in order to proceed. The deliberation has been given different names by different commentators. One of the most common is *conflict*. Also popular are *dispute* and *argument*. These words suggest that, in many people's view, the process would not be altogether amicable.

Settling, as discussed above, on the default word "debate", the next question is: who should be present at the debate? While all members of the society should,

[32] The future and conditional tenses are used throughout this paragraph. For the purposes of this dissertation, the creation of Walzer's forum, that is, a forum capable of producing the shared social meanings necessary for complex equality, is, with one or two exceptions, something which has *not happened yet*. However, in reviewing *Spheres of Justice*, a number of critics seem to have read Walzer as meaning that the way in which a society distributes this or that good *today* is already, and without more, the correct distributive mechanism for that particular society for that particular good. By designing a theory dependent on local distributive mechanisms, they conclude, Walzer has made himself a hostage to the status quo. See in particular B Barry, "Intimations of Justice" [1984] Columbia Law Review Vol. 84, 806 and J Cohen, Review of *Spheres of Justice* [August 1986] The Journal of Philosophy 83, 457. Dworkin also seems to be of this view, with his oft-quoted remark that if a society pursues Walzer's approach based on shared traditions, "political theory will be only a mirror, uselessly reflecting a community's consensus and division back upon itself": Walzer and Dworkin, supra n 29, 46.

[33] See supra section 2.2., second paragraph.

by rights, be invited (see previous paragraph), this may only bring about an *impression* of inclusion and fairness, not the real things. Okin (who discusses Walzer at some length) argues that women, for example, are "deprived of a voice"[34], male domination being so ingrained within modern society. Warren is undoubtedly right when he declares that,

> *"inequalities are suspect when the voices of those affected are absent"[35].*

This is even reminiscent of the test for standing in Article 263 TFEU (formerly Article 230 EC). But, returning to Okin, how could there ever be ""shared understandings" on abortion"[36] where one of the major constituencies, namely the fetuses themselves, quite literally have no voice and, though very much affected, cannot possibly participate in the debate? Armstrong sums up the problem very nicely when he talks of "the definition of the "us""[37]:

> *"Certainly one of the bones of contention that will remain for feminist theorists in particular is the question of who has the right to define this "we", and whether it might not be a great deal more fragmented, and even unresolvable, than our rhetorical "we"s would indicate. In this sense defining the "we" in advance of telling the story is wholly illegitimate, since defining the "we" has to be a part of the story itself, open to negotiation and contention."[38]*

If the presence of "those affected" is compulsory at the debate, then two obvious groups in that category, the distributees and the distributors, would need to be present. And Armstrong is right that the identification of at least the first of these two groups is "every bit as controversial and political"[39] as anything that might go on once the debate proper has commenced. The distributive community's shared understandings cannot be ascertained until the community itself has been demarcated.[40] Merkel also seems to be of the opinion that Walzer pays insufficient attention to this first step:

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[34] SM Okin, *Justice, gender, and the family* (Basic Books, New York 1989) 72.

[35] ME Warren, "What Can Democratic Participation Mean Today?" Political Theory, Vol 30, No 5 (Oct 2002) 677, 698.

[36] Supra n 34, 66. Or rather on the right to life and the right to control one's own body, which are the two rights which Okin mentions, since it is likely to be *these* which are being distributed, not abortions themselves.

[37] C Armstrong, "Philosophical Interpretation in the Work of Michael Walzer" Politics (2000) 20(2) 87, 91.

[38] Ibid., 90.

[39] Ibid., 91.

[40] On this analysis, there would need to be a debate before the debate. But this is surely right, because the right to decide on distributions (or *decision-making power*) is a distribuend like any other, and thus *its* shared understanding would technically also need to be elucidated in a prior

> *"It furthermore seems problematic that Walzer assumes a possible consensus on questions of distribution. That might be conceivable in his own idyllic upper-class community of Princeton, but it would hardly work in the Bronx or in Harlem, which are barely an hour away."*[41]

But if two of the major groups of "those affected" are the potential distributees and the potential distributors, it is equally apparent that these two groups are likely to *fundamentally disagree* on the correct distributive principle to be employed. This problem is nicely dissected by Trappenburg, who in fact identifies four orders of "actors": first-order actors (for example, parliaments), second-order actors (for example, local offices, boards, and so on – that is, distributors), third-order actors (potential recipients – that is, distributees), and public opinion. Each order has a different motivation or driving force (except public opinion, which shares the same driving force as second-order actors). According to Trappenburg[42], first-order actors are motivated by overall efficiency, second-order actors are motivated by (sphere-specific) equity, and third-order actors are driven by plain self-interest. Thus, the question to be asked is not just who is present at the debate, but in what role do they find themselves on the day of distribution?[43]

And, again, the matter of the power-balance within the forum arises. Distributees can certainly be held to ransom by distributors, but occasionally it is *distributors* who find themselves powerless. An employee of a law firm, forced to take "false independent" status[44] by his employers for tax purposes (theirs not his), will find himself to be a distributor of services who is entirely subservient to his supposed distributees. In EC competition law, too, sellers can conceivably be held to ransom by (dominant) buyers[45]. Will the two parties put their relative differences in power aside (or even, in Rawlsian terms, erect a "veil of

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debate. But then the same problem would simply arise again in *that* debate, and so on, ad infinitum.

[41] W Merkel, "Social justice and the three worlds of welfare capitalism" European Journal of Sociology (2002) 43: 59, 65.

[42] Supra n 25, 358-9, in turn drawing on the work of Jon Elster, *Local Justice: How Institutions Allocate Scarce Goods and Necessary Burdens* (Russell Sage Foundation, New York 1992).

[43] This links back to the point made above that one and the same person can easily understand one good in two or more ways.

[44] In other words, to become an independent service provider who then "invoices" his former employer at the end of each month instead of receiving a salary.

[45] See Case 298/83 *CICCE v Commission* [1985] ECR 1105, [1986] 1 CMLR 486. Walzer's remark that "the consumer is not, and can never be, sovereign" (*Spheres of Justice*, supra n 1, 113) is respectfully disagreed with.

ignorance") during the debate, in order to ascertain, in a neutral fashion, the appropriate distributive principle? Or will, as Okin suggests, the "more powerful" be able to silence, or render incoherent, those whom they dominate, so that the resultant "shared understanding" is only shared *in appearance*?[46]

It is even possible that some of the "more powerful" may do this unwittingly, entering the forum with a distorted view of their community, so entrenched that they "do not even consider it alterable"[47], such that the "shared understanding" at which they think they have arrived is in fact "buil[t] on the prevailing ideologies"[48]. The danger of an all-pervasive ideology contaminating all debates is not lost on Walzer, who comments that, although entry for participants is free,

> *"we may want to plead with some of them that they leave their conceptual baggage at the door."*[49]

And even if entry is free, implying that wealth makes no difference in the forum, those with money may still wish to use it to influence the thinking of others, via education, communication, or some other means. This point has been made forcefully by Barry[50]. According to him, any apparent consensus is actually the result of "power over communications" (and so on), exerted by "the beneficiaries from the *status quo*"[51]. This would give rise once again to the scenario wherein participants enter the forum unwittingly brain-washed, and then endorse an understanding of the good in question which is not theirs at all, but one planted by the powerful to perpetuate their own success (and perpetually to thwart the ambitions of the weak).

Deliberate or inadvertent ill-treatment of certain (weaker) factions during the debate is not the end of the story, however. How are participants, particularly those whose views did not survive into the final "consensus", to be treated *after* the debate? Ball flags up this issue in the context of gay rights:

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[46] Supra n 34, 112. Although one counter-argument might be that, in a Walzerian world, no party should hold significantly more power than any other.
[47] Ibid., 113.
[48] Ibid., 72. As Rustin points out, if an injustice has "not already become the subject of contention within a society", complex equality offers no grounds for intervening: supra n 26, 31.
[49] Supra n 22, 295. He makes a similar point in *Spheres of Justice*: "All non-political goods have to be deposited outside: weapons and wallets, titles and degrees". Supra n 1, 304.
[50] Supra n 30, 77-8.
[51] Both quotations from ibid., 78 (Barry's italics). But, again, in a Walzerian world, would not the tyrannical use in the sphere of decision-making (ie in the forum) of success gained in the sphere of communications be prohibited as a "blocked exchange"?

> *"[Gay men and lesbians] should be wary of a theory of political morality that does not contain the necessary protections against shifting majoritarian norms."*[52]

Walzer himself sympathizes with those whose favoured "meaning" was rejected in the forum, and who now find themselves to be a minority.

> *"I don't mean to dismiss the many problems that autonomy poses, especially with regard to non-believers, who are forced to take on religion as a kind of ethnic affiliation. (I suspect that most religious communities have included significant numbers of non-believers.) Their condition is not, however, entirely different from that of religious fundamentalists in a secular state. Another problem is more serious: it is very difficult to stop the religious majority from using state power across both communal boundaries and distributive spheres."*[53]

With that last sentence, Walzer seems to be implying that, at least in a society in which complex equality is correctly practiced, the minority will be able to take comfort from the fact that the majority will be prevented from using their status as a dominant good; "membership of the majority" will not be allowed to be a pass-key to access all spheres. These issues are discussed in greater detail below, in Chapter 4, section 4.4.2.3., on the Tyranny of "Normalcy".

The last question to be asked is *when*, or at least *how often*, should the debate take place? Walzer himself is clear that

> *"[s]ocial meanings are historical in character; and so distributions, and just and unjust distributions change over time."*[54]

And later:

> *"Boundaries […] are vulnerable to shifts in social meaning, and we have no choice but to live with the continual probes and incursions through which these shifts are worked out."*[55]

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[52] Carlos A Ball, "Communitarianism and Gay Rights" 85 Cornell L Rev 1999-2000 443, 451.

[53] Supra n 22, 289. Scanlon also considers the problem of "those with divergent views", post-debate. He concludes that, in a private association, it *would* be acceptable to "deny [the relevant] goods to those who clearly lack [the required] beliefs". However, at the level of political society, goods such as civil and human rights must be extended even to people who "reject [society's] most basic tenets": TM Scanlon, *The difficulty of tolerance: Essays in political philosophy* (CUP, Cambridge 2003) 194-5.

[54] *Spheres of Justice*, supra n 1, 9.

[55] Ibid., 319. See also M Walzer, "Liberalism and the Art of Separation" Political Theory Vol. 12 No. 3 (Aug 1984) 315, 328, where he talks of the need for "continued revision": "the arguing and the fighting have no visible end". And four years later, he declares, "the interpretative

It follows, then, that the debate itself must be *continual*. All the commentators seem to concur that this is the only solution. Danchin, for example, writes that "an unforced consensus must constantly be sought"[56]:

> *"For value pluralism not to lapse into the subjectivism of utopian universalism (religious or secular fundamentalism) on the one hand, or apologetic relativism (illiberal nationalism) on the other, it must strive for objectivity by continually seeking an overlapping consensus on the conflicting ends that divide cultures, groups, and individuals."*[57]

Warren notes that "where individuals are empowered to serve as boundary patrols between spheres", justifications of inequalities (and therefore the distributive criteria which gave rise to them) would have to be "continually challenged and reworked"[58].

Clark is heavily critical of Walzer, but certainly agrees that the distribution of goods "is a matter of continuing argument rather than consensus"[59]. Thigpen and Downing also talk about "continuing disagreements and unanswered questions"[60], observing, with regard to the presuppositions held by the participants of the debate, that "it is not possible to scrutinize every aspect of an intellectual inquiry at one time"[61]. They conclude:

> *"[P]resuppositions may have been questioned yesterday, and they may be questioned again tomorrow. Those engaged in inquiry may reexamine their assumptions when those who question the continued usefulness of a concept or an approach gain the serious attention of their colleagues."*[62]

2.5. An objection: Walzer's "relativism", and the need for an override

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enterprise goes on and on, never moving toward definitive closure". See M Walzer, "Interpretation and Social Criticism" in SM McMurrin (ed), *The Tanner Lectures on Human Values*, viii (CUP, Cambridge 1988) at 24.

[56] Peter G Danchin, "Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law" 33:1 Yale J Int'l L 2008 1, 53.

[57] Ibid., 50 (Danchin's emphasis).

[58] Both quotations from supra n 35, 698.

[59] Samuel Clark, "Society against Societies: The possibility of transcultural criticism" Res Publica (2007) 13:107, 110.

[60] Supra n 27, 546.

[61] Ibid.

[62] Ibid.

A common objection to complex equality also takes as its point of departure the notion of "shared social meanings", that is, shared, to a greater or lesser extent[63], by the community in which the distribution is to take place. Allowing every society to be judged by its own yardstick, rather than insisting that all societies be judged by a single, universal yardstick, has led to Walzer's being labeled as a relativist.[64] If the community is left to fix its own distributive criteria for every good, answerable only to "(internal) standards of justice"[65], what is to stop it settling on disagreeable, or even cruel, criteria? Rustin warns that Walzer's theory may entail "practical indifference to barbarity"[66]. Scanlon sums up the objection thus:

> *"Opponents of relativism thus commonly appeal to the possibility that the accepted norms of a society might license conduct which involves treating people in horrible ways."*[67]

So what types of things might be classed as "horrible"? Nationalism is a popular example. Danchin confirms that cultural relativism, because of its penchant for "particularistic ideology" and "anticosmopolitanism", may well bring in its train "variants of nationalism"[68]. So if the Nuremburg Laws of 1935, which distributed (inter alia) the right to marry and even the right to engage in extra-marital relations, had been found to be a manifestation of the "shared understanding" of the German people at that time of those rights (and who should have them), does it follow, under complex equality, that those laws were just?

Another example is slavery, where many commentators allege that Walzer himself is in violation of the rules. In a section discussing whether the Athenian treatment of *metics* was unjust (given the conception of citizenship that prevailed in Athens), Walzer leaves the question of *slaves* aside, because "the injustice of slavery is not disputed these days, at least not openly"[69]. This judgment appears to be extrinsic to the community in question, and would seem to rely on

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[63] See the previous section.

[64] One of the earliest allegations of relativism came from Dworkin, leading to the exchange of views in the *New York Review of Books* mentioned above (supra n 29). Dworkin, in a review of *Spheres of Justice* in an earlier issue of the *Review*, later reprinted in his own *A Matter of Principle*, had commented, "We cannot leave justice to convention and anecdote": R Dworkin, *A Matter of Principle* (Clarendon Press, Oxford 1986) 220.

[65] *Spheres of Justice*, supra n 1, 315.

[66] Supra n 26, 31.

[67] TM Scanlon, *What we owe to each other* (Bellknap Press of Harvard University Press, Massachusetts 1998) 337.

[68] Supra n 56, 51.

[69] *Spheres of Justice*, supra n 1, 53.

extrinsic values. Carens describes the remark as "puzzling"[70]. Is Walzer on the way to acknowledging the presence of an outer sphere (to borrow Carens' model of concentric circles) containing

> *"minimal standards of justice applicable to all contemporary states, regardless of their own particular histories, cultures, or political arrangements"[71]?*

Opponents of abortion might also wish to apply such standards to states which allow the practice (presumably in accordance with shared social meanings[72]). Those who take issue with female genital mutilation, living outside the countries in which this ritual is observed, might likewise need to call on them. One might describe these standards as *transcultural*, or *universal*. They are standards which *override* (or which those invoking them hope will override) the local norms at issue.

However, given the nature of complex equality, the concept of and (arguable) need for an "override" is not limited to inter-state disagreements, although these may provide the easiest or most sensational examples. *All* spheres, including and perhaps even especially those within the same state, are required to be, and to be kept, impregnable to outside influences. Within each distributive sphere, there is a specific social meaning which must be respected:

> *"Dominance is ruled out only if social goods are distributed for distinct and "internal" reasons."[73]*

The structure provided by the social meanings is vital to the theory:

> *"There are no external or universal principles that can replace it."[74]*

And yet, as several commentators have shown, principles that are certainly external to the distributive sphere concerned, and quite possibly universal as well, can be discerned at various points in Walzer's argument. These principles, which (arguably) override the ban on boundary crossings, could be labeled as "interspherical"[75], or even "trans-sphere"[76]. The most common example is equal

[70] Carens, supra n 6, 58.
[71] Ibid.
[72] But see supra text accompanying n 36.
[73] *Spheres of Justice*, supra n 1, xv.
[74] Ibid., 314.
[75] This term used by Gutmann, supra n 25, 107.

membership of the community, that is, equal citizenship. Walzer himself implies that this is a *blanket* principle, applicable across all spheres, in the third of his three "very general" principles:

> *"that [a] distribution must recognize and uphold the underlying equality of membership"*[77].

Seizing on this, critics have rushed to proclaim equal citizenship as a "referee criterion" or "master principle"[78], a "criterion that seems to apply across [all] societal spheres"[79], and a "fundamental principle […] across other relational spheres"[80]. According to Gutmann, equal citizenship "inform[s] distributive justice in many other spheres"[81]. According to Miller, it "plays a regulative role" but is *not* a fundamental principle[82]. Den Hartogh sums up the issue in this way:

> *"It follows that the sphere of membership cannot be fenced off from the other spheres in the way required by the nondominance principle: the possession of membership determines or codetermines one's share in the other spheres."*[83]

Walzer later admitted that citizenship has a certain "centrality" within the theory, and that it takes on "heightened instrumental and also symbolic value":

> *"Indeed, this value may itself be critical, as both Miller and Swift suggest, in adjudicating the internal disputes."*[84]

Other concepts that critics have asserted are, or may be, overrides include responsibility[85], justice[86], morality[87], and recognition[88]. A controversial addition to the list would be democracy itself. Armstrong puts the argument well:

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[76] This term used by Walzer, supra n 22, 294.
[77] *Spheres of Justice*, supra n 1, 84.
[78] Both terms from Trappenburg, supra n 25, 347.
[79] Ibid., 346.
[80] James W Fox, Jr, "Relational Contract Theory and Democratic Citizenship" 54 Case W Res L Rev 2003-2004 1, 37.
[81] Supra n 25, 116.
[82] D Miller, "Introduction" in Miller and Walzer, supra n 25, 3.
[83] G den Hartogh, "The Architectonic of Michael Walzer's Theory of Justice" Political Theory, Vol 27, No 4, Aug 1999, 491, 494.
[84] Supra n 22, 87.
[85] Trappenburg, supra n 25, 346.
[86] Gutmann, supra n 25, 107 (and see also RJ van der Veen, "The Adjudicating Citizen: On Equal Membership in Walzer's Theory of Justice", British Journal of Political Science, Vol 29, No 2 (Apr., 1999), 225, 228).
[87] Ibid., 112.
[88] "[S]omething that may be achieved in many spheres": R Keat, "Colonisation by the Market: Walzer on Recognition" 1997 Journal of Political Philosophy Vol 5, No 1, 93, 103.

> *"[T]he only way of ascertaining (choosing) our goals is the democratic way. This is the one a priori, transcendental and universal principle that Walzer will not drop: that we must not stop telling stories, and that only we can be the judges of which are the best."*[89]

From this argument it is not a giant leap to conclude that the *entire theory*, since it necessarily has to apply across the board, is a universal principle and is thus in violation of itself. Ball articulates this nicely:

> *"Similarly, one can view the rule that spillover effects from one sphere to another always lead to injustice, as a form of metaprinciple from which no departure is possible without violating Walzer's theory of justice."*[90]

It would not be fair to finish this section, however, without briefly considering what Walzer himself has said on these topics over the years. It is submitted, for the purposes of this dissertation, that Walzer *all along* entertained the idea of certain overarching norms. In 1983, in *Spheres of Justice*, he referred to "our common humanity", which he said gave rise to two rights: the right to life and the right to liberty[91]. But anything else, he went on, would have to "follow from shared conceptions", and would be "local and particular in character"[92].

In 1988, in *Interpretation and Social Criticism*[93], he modified this position slightly, accepting that there was what he called "a kind of minimal and universal moral code"[94], consisting of prohibitions on murder, deception, betrayal, and gross

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[89] Supra n 37, 90.
[90] Supra n 52, 491.
[91] *Spheres of Justice*, supra n 1, xv.
[92] Ibid. However, prior to *Spheres of Justice*, it appears that he took a tougher line. In an article in 1981, for example, he wrote: "What is crucial, however, is that the redistributive pattern [the people] choose is not subject to authoritative correction". See M Walzer, "Philosophy and Democracy", Political Theory, Vol. 9, No. 3 (Aug., 1981), 379, 385.
[93] M Walzer, "Interpretation and Social Criticism" in SM McMurrin (ed), *The Tanner Lectures on Human Values*, viii (CUP, Cambridge 1988) (hereinafter referred to as *Interpretation and Social Criticism*).
[94] Ibid., 22.

cruelty[95]. In the same year's *Company of Critics*[96], he insisted that it was not his wish to be an apologist "for this (or any other) society"[97].

In 1994, in *Thick and Thin*[98], he continued his discussion of the "moral minimum" or "Minimal Morality"[99]. Again, he considered that it "most likely"[100] would consist of rules against murder, deceit, torture, oppression, and tyranny. But the point that he was keen to stress was that this "thin morality" does not "leap from the philosopher's mind like Athena from the head of Zeus": it must be (or rather have been) "worked on"[101]. Thus, even supposedly universal norms have been "work[ed]… out"[102] by men and women who themselves are "creatures of history"[103], that is, particular people, from a particular time and place, with particular fears, beliefs, goals, and so on:

> *"Minimalism… is less the product of persuasion than of mutual recognition among the protagonists of different fully developed moral cultures."*[104]

In 1995's *Pluralism, Justice, and Equality*, he again conceded that "[m]urder, torture, and enslavement are wrongful features of any distributive process"[105]:

> *"We need a theory of human rights (or its functional equivalent in other cultures) to set the basic parameters within which distributions take place."*[106]

2.6. The ECJ and its override: An answer to the objection

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[95] Thus, according to Walzer, the Biblical prophets were able to employ the minimal code – "a kind of international law" – in order to criticize foreign nations with alien values (Jonah in Nineveh, for example): "don't violate treaties, don't kill innocent women and children, don't transport whole nations into involuntary exile". See ibid., 76 and 78-9.

[96] M Walzer, *The Company of Critics: Social Criticism and Political Commitment in the Twentieth Century* (Basic Books, New York 1988, 2nd edn 2002) (hereinafter referred to as *Company of Critics*).

[97] Ibid., xix.

[98] M Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (University of Notre Dame Press, Indiana 1994) (hereinafter referred to as *Thick and Thin*).

[99] Ibid., 9.

[100] Ibid., 10.

[101] All quotations from ibid., 12.

[102] Ibid., 14.

[103] Ibid., 12.

[104] Ibid., 17, emphasis added.

[105] Supra n 22, 293, emphasis added.

[106] Ibid.

In the context of European law in general, and the practice of the European Court of Justice in particular, it is submitted that several overarching "codes" are already in place that could, without the slightest difficulty, be pressed into service as "overrides" to be used to "screen" local, tradition-sensitive distributive criteria, should the Court decide to adopt a Walzerian approach to its equality cases.[107] Pre-eminent amongst these, however, is the European Convention on Human Rights (ECHR), which in two important ways already has what might be called *override status*. Firstly, its entire *raison d'être* was to act as "a bulwark against any recrudescence of [Nazi or Fascist] dictatorship"[108]; by its very nature, therefore, it would override any law, however widely proclaimed or obeyed, that constituted a threat to the rights which it contained. Secondly, the European Court of Justice itself has declared that European law *enshrines* the notion of human rights common to the EU's Member States, and that:

> *"[I]nternational treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law"*[109].

It has thus repeatedly used the ECHR as a yardstick by which to measure national, and EU, legislation.[110] Furthermore, all EU Member States are

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[107] As well as the European Convention on Human Rights, which is dealt with in the text, there is the European Union's own Charter of Fundamental Rights [2000] OJ C364/1, the United Nations Charter 1945, the Universal Declaration of Human Rights 1948, Convention No 111 of the International Labour Organisation 1958, the European Social Charter 1961, the International Covenant on Civil and Political Rights 1966, the International Covenant on Economic, Social and Cultural Rights 1966, the International Convention on the Elimination of All Forms of Racial Discrimination 1966 ("CERD"), and the Convention on the Elimination of All Forms of Discrimination against Women 1979 ("CEDAW"). To these could even be added the Member States' constitutions.

[108] AH Robertson and JG Merrills, *Human Rights in the World: An introduction to the study of the international protection of human rights* (4th edn MUP, Manchester 1996) 120.

[109] Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, para. 15. At the end of the same paragraph the ECHR is referred to explicitly, as it is for much of the rest of the judgment. The declaration in *Hauer* was preceded by a number of declarations of a similar nature, albeit not referring directly to the ECHR. See Case 29/69 *Erich Stauder v City of Ulm* [1969] ECR 419; Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 491. Eventually, the legislature caught up with the judiciary, and the obligation on the EU to respect the rights guaranteed by the ECHR was set out explicitly in Article 6 of the Treaty on European Union (the "Maastricht" Treaty, signed in 1997), hereinafter "TEU".

[110] Space forbids a full rehearsal of the cases in which the ECHR has played a prominent, or even decisive, role in proceedings. However, amongst the most well-known of these cases (and with the right invoked in parentheses) are the following: Case 44/79 *Hauer*, supra n 109 (the right to property and the freedom to pursue a trade or profession), Case 63/83 *Regina v Kent Kirk* [1984]

signatories to the ECHR in their own right, which means that the rights enshrined therein may be invoked throughout the Union.[111] To all intents and purposes, this means that all activity in the bloc – including distributive activity – is *already* carried out under the gaze of the European Convention. The Convention sets universally-applicable maximum and minimum parameters for behaviour, and behaviour which falls outside these parameters – even if the result of consensus – stands to be impugned.

Although there are other candidates, then, it is proposed that the Court should use the ECHR, representing as it does both nation-wide and continent-wide consensus, to help it to scrutinize the "sphere-specific" distributive principles with which it is faced and to act, if necessary, as a kind of safety valve or circuit-breaker. As will be argued at greater length elsewhere, the European Community is well-suited to the theory of complex equality, and the "override question" provides another illustration. The ECJ has both faced *and solved* the problems of if, when and how to override local, narrow rules where they clash with wider objectives; it is very much a past master when it comes to these particular conundra. Indeed, the entire European project could be seen as an ongoing exercise in finding and maintaining the right balance between diversity (many inner spheres; many sets of principles) and union (one outer sphere; one set of principles).[112] As later examples from the case-law will show, any

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ECR 2689 (no punishment without law), Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651 (the right to a fair trial), Joined cases 46/87 and 227/88 *Hoechst AG v Commission of the European Communities* [1989] ECR 2859 (the right to the inviolability of the home), Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] ECR I-2925 (the freedom of expression), Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR 3689 (the freedom of expression). For a recent, high-profile rights case, see Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union, Commission of the European Communities, United Kingdom of Great Britain and Northern Ireland* (ECJ 3 September 2008) (the right to a fair trial and the right to property).

[111] While they may be invoked *by* any individual on European territory, regardless of nationality, they may only be invoked *against* the Signatory States themselves. However, via a form of *drittwirkung* (though not in the orthodox sense), the State may be held responsible where the breach is carried out by a second individual, for failing to have implemented the Convention sufficiently rigorously, and thus the Convention could be said to have horizontal as well as vertical effect (although again not in the orthodox sense).

[112] The use of the adjectives "inner" and "outer" here draws (again) on Carens, who talks of an "innermost... circle" and an "outermost circle": Carens, supra n 6, 60 and 63. "United in diversity" was at one time mooted as a possible motto for the EU. See the (later scrapped) Treaty establishing a Constitution for Europe [2004] OJ C310/1, at Article I-8.

instances of “barbarity”, or “horrible” treatment[113] which may emerge from a given distributive community’s shared understandings will be not *latent* (as they could have been, and could have remained, under the Aristotelian approach), but *patent*: quickly identifiable by both practitioners and judges, who of course are already extremely familiar with the ECHR. If a distributive criterion offended against the “Minimal Morality”[114], it could then be swiftly “rule[d] out”[115] and any distribution based upon it declared flawed, leaving only the question of remedy outstanding.

[113] The words in quotation marks taken from Rustin and Scanlon respectively, as cited at the beginning of section 2.5.
[114] Walzer, *Thick and Thin*, supra n 98, 9.
[115] Walzer, *Spheres of Justice*, supra n 1, 162.

3. The principle of equal treatment of persons irrespective of gender

3.1. Introduction

In Chapter 1 some illustrations were given of how easily a comparison could be engineered to attain a certain result, for example, with regard to the choice of comparators.[1] It was also seen how adjusting which properties were to be taken into account could transform or even reverse the result of a comparison.[2] Thus it appears that what McColgan calls the "comparator-driven approach" to equality[3], and what Holtmaat and Tobler call the "symmetric approach" to equality[4], is endlessly malleable. Nowhere is this more apparent (in the ECJ's case-law, at least) than in the field of gender discrimination.

The Aristotelian "like cases alike" (or "like for like") test[5] admits of two possible outcomes ("discrimination" and "not discrimination"), but each can be arrived at via two different routes, resulting in four conceivable permutations; see the table at Appendix I. As the result to be inserted in the second column is generally known in advance of performing the test, that is, it is generally already known whether Comparator 1 and Comparator 2 have been treated in like fashion or in unlike fashion, the column which usually (although not always) offers the best scope for "rigging" (judicial or otherwise) is Column 1. It will be seen that a great deal hangs on the result of the enquiry as to whether the two comparators are like, or unlike. This in turn depends in large part upon which properties are to be taken into account for the purposes of the comparison, and (perhaps the same thing) upon which degree of "difference awareness" is to be employed while doing the comparing.

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[1] See supra, section 1.2.

[2] The agents of such engineering or adjusting may, in the first instance, be the Distributors themselves, but ultimately, and for the purposes of this dissertation, most importantly, they may be the judges before whom the discrimination case is eventually brought.

[3] Aileen McColgan, "Cracking the comparator problem: Discrimination, "Equal" Treatment and the Role of Comparisons", EHRLR 2006, 6, 650, 650.

[4] R Holtmaat and C Tobler, "CEDAW and the EU's Policy in the Field of Combating Gender Discrimination", Maastricht Journal of European and Comparative Law, 2005, v. 12, n. 4, 399, 417.

[5] These two phrases are also borrowed from McColgan: Supra n 3, 651 and 660.

As Hervey and Shaw point out, "the archetypal question is that of whether a woman is "like" or "unlike" a man when she is pregnant"[6]. This is a question the ECJ has now attempted to answer many times, and which is quite often coupled with that (to some palates at least) unsavoury question, "Is a pregnant woman "like" or "unlike" a sick man?". These questions will be examined at section 3.4. below. However, before embarking on the case-study proper, it is necessary to deal with two preliminary issues – how the Walzerian analysis is to proceed (section 3.2.) and, crucially, whether the theory can accommodate characteristics and voluntary choices (section 3.3.).

3.2. Outline of analysis and taxonomy of results

In analyzing an ECJ equality case from the Walzerian perspective, it is first necessary to identify the good being distributed, so as to be able to delineate the sphere at issue. The person or entity invoking the principle of equal treatment will either already be in this sphere, or else will be trying to gain access to it. Likewise, their (real or hypothetical) "comparator"[7] will either already have entered the distributive sphere, or will be attempting to enter it. It will then be necessary to identify any boundary breaches, whether at the level of distributee, or at the level of distributor, or indeed anywhere else.

All results except those arrived at by the distributive community itself or, in the event of a dispute, by the person universally accepted as arbiter[8], will be provisional only. Thus, for everyone else, a common answer to the question, "Has there been a breach of the principle of equality?" is:

> *"This cannot be known until the distributive community concerned has pronounced upon whether y is or is not part of its shared meaning of x."*[9]

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[6] TK Hervey and J Shaw, "Women, work and care: women's dual role and double burden in EC sex equality law", Journal of European Social Policy, Vol. 8, No. 1, February 1998, 43, 48.

[7] Under the Aristotelian test. Complex equality does not actually entail comparison, and so can technically proceed without a comparator at all – for a concrete example, see below text accompanying n 81.

[8] See section 7.2.2. below.

[9] Where x is the good being distributed. In what follows, this will be referred to as the Standard Contingent Reply. The same system of variables is used here as is used in Walzer's own statement of the theory of complex equality in *Spheres of Justice*: *"No social good x should be distributed to men and women who possess some other good y merely because they possess y and without regard to the meaning of x."* See M Walzer, *Spheres of Justice – A Defense of*

That said, there are times when a boundary breach is so blatant that it may simply be presumed. And even on other occasions, a good prediction can usually be made of what the result will be.

Results, then, fall into two basic categories: "breach" or "no breach". An important point to remember is that there can still be a fair degree of inequality (of the sort that Walzer would call *simple* inequality) *within* the distributive sphere, even after the test has been applied and a finding of "no breach" has been made. Such an inequality would be one of the "small inequalities" to which Walzer referred in *Spheres of Justice*[10], a "just" inequality in the sense that the reason for any distinction being made falls *within* the meaning of the good being distributed, and not outside it. Walzer never promised to "even[…] up the balance", merely to

> *"get[…] the unevenness right."*[11]

The outcome of most social transactions involves a certain amount of inequality; one party rarely walks away from such a transaction in exactly the same position as the other party. And, where court cases are concerned, it is almost inconceivable that both parties would fare identically, unless they had come to some kind of (highly unusual) fifty-fifty settlement. It has been clear since King Solomon's day that there must be a winner and a loser; equality of outcome is neither possible nor even desirable.[12] These are in most cases the benign inequalities of which life is necessarily made up. They do not offend against complex equality, because the ground upon which any distinction is founded is intrinsic to, rather than extrinsic to, the sphere at issue. In US terms, it is the *non-suspect* nature of the ground which leads to the prima facie *assumption* that the distinction will turn out to be inoffensive. As Balkin puts it, such inequality is,

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Pluralism and Equality (Basic Books, New York 1983) 20 (hereinafter referred to as *Spheres of Justice*) – Walzer's italics.

[10] Ibid., 17. See also more detailed examination in Chapter 2 above – section 2.2.

[11] Ibid., 260.

[12] Referring to 1 Kings 3: 16-28. Of course the outcome, while unequal on its face, may, looking at the bigger picture, lead to equality *overall*, for example, where a damages payment to one party simply restores the balance which existed before the contested event occurred.

> *"the inevitable if occasionally unfortunate outcome of markets, individual private preferences, and judicial respect for legislation passed by democratically elected representatives of the people."*[13]

Tridimas explains it thus:

> *"[I]n the sphere of economic law, the principle of equality prohibits only measures imposing risks on traders beyond those which they can reasonably be expected to bear in the light of the underlying economic circumstances."*[14]

What one might call "normal" risks must just be run as usual; any negative outcome will not be actionable as a breach of the principle of equal treatment. In other words, the loser may not sue the winner.

In what follows, then, many cases which do not disclose any boundary breach ("no breach" cases) may alternatively or in addition be referred to as "small inequalities".

3.3. Characteristics and voluntary choices: Is the theory fit for purpose?

A first issue that needs considering, especially in the context of suspect grounds, is the extent to which complex equality and boundary-defence can work *at all* in the combating of discrimination. A typical boundary breach presupposes *two distributions* in two, neighbouring spheres.[15] In the first distribution, X has distributed to him or her a good which will turn out to be dominant (or, perhaps more importantly for present purposes, *negatively* dominant); X then moves to the second sphere taking this good with them. In the second distribution, X has distributed to him or her, *on the strength of* his or her possession of said good, a second good (assuming that possession or otherwise of the first good actually has nothing to do with the second good, and

[13] JM Balkin, "*Plessy*, *Brown*, and *Grutter*: A play in three acts" 26 Cardozo L Rev 2004-2005, 1689, 1717.

[14] T Tridimas, "The Application of the Principle of Equality to Community Measures" in Alan Dashwood and S O'Leary (eds), *The Principle of Equal Treatment in E.C. Law* (Sweet & Maxwell, London 1997) 228 – emphasis added.

[15] The one described in this section is by no means the only sort. For example, the one described in this section is a boundary breach by a distributee. However, one could also have a boundary breach by a distributor. Nevertheless, the fact remains that all boundary breaches entail two distributions.

does not form part of the second good's shared meaning). A complex egalitarian would now consider that the boundary between the two spheres had been breached: X had used the first good tyrannically to gain the second, and so the second distribution was flawed. X should have left the first good "at the door" (of the second sphere). This begs the somewhat difficult question: can a characteristic be regarded as the product of a distribution? Put another way, is a characteristic a distribuend, such that it can go on to be regarded as a dominant, or negatively dominant, good?

It is worth starting with an easier version of this question, albeit one equally as important for the case-law analysis which must be undertaken: can a *voluntary choice* be regarded as the product of a distribution? For example, when, in an age discrimination case called *Bartsch*, the claimant enters the "second sphere" (where the distribuend is a survivor's pension), she brings with her the fact that she *chose* to marry a man twenty one years her senior.[16] She exercised a free preference. Except perhaps for classicists, there is no sphere run by Cupid, where he "distributes" those with whom the "distributee" must fall in love. However, that is to take too simplistic or literal a view of Walzer's theory, which admittedly many critics do, especially when it comes to visualizing the network of spheres itself, and working out what constitutes a sphere in the first place. There is absolutely no reason why *choice* should not be a completely acceptable distributive criterion, as long as the relevant community is in agreement. Examples given by Walzer include the *choosing* of elected representatives (in the sphere of politics), and, indeed, the *choosing* of partners (in the sphere of romantic love). However, in both of the latter examples, it is the distributor who chooses. But a perfectly obvious example of a sphere where it is the distributee who chooses is the market itself.[17][18] So, by analogy, it is not hard to envisage a "first sphere" wherein Mrs Bartsch chose the late Mr Bartsch as a marriage

[16] Case C-427/06 *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [2008] ECR I-7245.

[17] Although no doubt Foucault would object that consumers are not making a free choice at all, but merely acting upon cues planted in them by "experts" via the media. The individual's acting, unquestioningly, on this expertise is one of what Foucault calls the "techniques of the self", a kind of self-regulation which in turn forms part of his theory of *biopolitics*: M Foucault, "The Political Technology of Individuals" in LH Martin, H Gutman, PH Hutton (eds), *Technologies of the self: a seminar with Michel Foucault* (University of Massachusetts Press, Amherst 1988).

[18] In Mayer's critique of Walzer's industrial democracy, he argues that an employee *chooses* to put himself under the authority of his manager; if that is correct, then the sphere of office would also become a sphere in which it is the distributee who chooses: R Mayer, "Michael Walzer, Industrial Democracy, and Complex Equality" Political Theory, Vol. 29 No. 2, April 2001, 237.

partner. (Again, to worry unduly about the identity of the *distributor* in this sphere is to subject a postmodern theory to seventeenth century-style analysis: Walzer makes quite clear, in any event, that in matters of the heart potential lovers distribute themselves via what he calls "the gift of self".)[19] The conclusion, then, is that *voluntary choices* can indeed be regarded as the product of a distribution.

Returning to the question of *characteristics*, then, it goes without saying that these are conceptually close, sometimes very close, to voluntary choices.[20] Ball, for example, regards membership of the gay community as a voluntary choice[21], while others hold that homosexuality is more a matter of nature than nurture; for such people homosexuality would presumably more properly be described as a characteristic.[22] Walzer seems happy on several occasions to at least entertain the idea of a boundary breach wherein the party in breach brings with them to the "second sphere" a *characteristic*, the possession of which causes (or at least might cause) the second distribution to be flawed. The very first examples he gives draw on Pascal, and envisage the tyrannical importation into a foreign sphere of such matters as strength and handsomeness.[23] Later, he speculates as to how *charm* might be used in the acquisition of love, how

[19] *Spheres of Justice*, supra n 9, 238. "The sphere of private affairs is exactly like the market in commodities, except that these commodities own themselves": ibid.

[20] Schiek's three-limbed schema for classifying the grounds of discrimination is instructive here (see also below, section 4.2.1). The second and third classifications are actual and unalterable biological differences (for the purposes of this section, "characteristics"), and differences which are the product of choice (for the purposes of this section, "voluntary choices"). The schema is explained in full in D Schiek, "A New Framework on Equal Treatment of Persons in EC Law?" European Law Journal, v. 8, n. 2, June, 290, particularly at 309-310.

[21] The gay community is a "communit[y] of choice", not a "[c]ommunit[y] into which people are born": Carlos A Ball, "Communitarianism and Gay Rights" 85 Cornell L Rev 1999-2000 443, 449-450.

[22] Schiek, however, agrees with Ball that sexual orientation is a product of choice: supra n 20, 310. Howard refers to it as a characteristic: E Howard, "The case for a considered hierarchy of discrimination grounds in EU law" 13 MJ 4 (2006), 445, 454. This dissertation takes no position on the matter. Wintemute also considers the proximity of characteristics and choices, this time in the context of gender discrimination: R Wintemute, "When is Pregnancy Discrimination Indirect Sex Discrimination?" Industrial Law Journal, Vol 27, No 1, March 1998, 23. He wonders whether the fact that pregnancy is (usually) a result of the exercise of free will makes any difference to the way in which it should be viewed by discrimination law. As examples of choices of which only *men* are physically capable, he gives growing a beard, or donating sperm: ibid., 27-28.

[23] *Spheres of Justice*, supra n 9, 18-19. Another early example is *eccentricity*, which Walzer describes as "a social good like any other": ibid., 8.

being stimulating might be used in the acquisition of influence, or even how *skill at bargaining* might be used in the acquisition of pictures.[24]

In an important section on abstraction, he notes how many of a person's "capacities"[25], and even the capacities "to make an effort or to endure pain"[26] needed to make use of the former capacities, are, at least in some philosophers' eyes, merely "the arbitrary gift of nature"[27]. Walzer objects to such abstraction, believing that a capacity such as (to take a random example) skill at playing the piano *should* enable one to acquire (say) public honour. Again, the "good" which this person brings with them to the sphere of honour, and which, potentially, could be dominant (in this case obviously not), is a *characteristic*. This implies that there was an earlier "distribution", to all humans, of what Walzer calls the "goods in their minds".[28] One could hypothesize as to who the distributor in this original sphere might be – Mother Nature, perhaps (echoing Walzer's "gift of nature"), or some kind of Deity[29], or even, from the scientific point of view, one's parents or other forebears.[30] But again it is futile to become preoccupied with such matters in a postmodern theory. It is simply irrelevant; the use of the word "distribution" in a case like this is really only a kind of shorthand. The real point is that *all* matters (including characteristics like piano-playing ability) must stay within the sphere *to which they are germane*, *unless* their presence in a second matter's sphere is sanctioned by the shared understanding of that second matter.

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[24] Ibid., 23-24. Walzer also seems to regard what he calls "birthright" (in other words, nobility) as a potentially dominant good; he even nominates the sphere in which it is distributed as "the sphere of birth and blood": ibid., 16.

[25] Ibid., 260.

[26] Ibid., 261.

[27] Ibid.

[28] Ibid. If Walzer's tone is understood correctly, he actually regards *this* distribution as *more important* than a distribution of physical goods such as "hats and coats": ibid.

[29] Walzer happily acknowledges God as a distributor when he talks about "divine grace" in Chapter 10 of *Spheres of Justice*. Of course, God's distributive criteria, both for Grace and (if applicable) characteristics, are unknown and unknowable. As Walzer laconically puts it, "we don't know how [desert] figures": supra n 9, 260.

[30] In the era of genetic engineering, it is not at all far-fetched to talk about the distribution of genes, ordinarily by one's parents, but occasionally by third parties via some manner of donation. Although it would vary from community to community, it seems likely that the correct distributive criterion for any such donation would be need. If it ever came about that wealth or status could "buy" a person's children superior genes, this would almost certainly be regarded as a boundary breach, or blocked transaction.

Critics have also happily embraced the idea of characteristics as goods capable of giving rise to boundary breaches. Trappenburg gives as one of her many examples the situation where, of two political candidates, one has clearly garnered more votes in an election, which is the only valid way of distributing parliamentary seats in most communities. However, she then asks whether the *other* candidate's being trustworthy and decent, or being black, or being unattractive, might be a reason to cede the seat to *him*. Of course, if the seat were ceded to the second candidate on the grounds of one of these characteristics, there would be a very compelling argument for deeming this a boundary breach.[31]

The conclusion, then, must be that *characteristics* can indeed be regarded as the product of a distribution, even if it is a hypothetical one. Complex equality and boundary-defence may thus be relied upon in the fight against discrimination, which is necessarily based on characteristics, or voluntary choices[32], possessed or made by the party discriminated against.

3.4. Pregnancy

3.4.1. Case-law

The comparing of pregnant women with sick men has been described as "insulting"[33], "inappropriate"[34], "distasteful and unfortunate"[35] and "inaccurate and politically damaging"[36]. At best it could be called a somewhat troubling

[31] See Margo Trappenburg, "In Defence of Pure Pluralism: Two Readings of Walzer's *Spheres of Justice*" The Journal of Political Philosophy, Vol 8, No 3, 2000, 343, 350-352.
[32] Or ascribed differences. This is the first of Schiek's three categories – see supra n 20.
[33] J Dine and B Watt, "Introduction" in Janet Dine and Bob Watt (eds), *Discrimination Law: Concepts, Limitations and Justifications* (Longman, London and New York 1996) 4, referring to the UK cases of *Turley v Allders Department Stores* [1980] IRLR 4 (woman dismissed on grounds of pregnancy not victim of sex discrimination – sick man comparison used only by Ms P Smith in her dissent) and *Hayes v Malleable Working Men's Club and Institute* [1985] IRLR 367 (overturning *Turley* – sick man comparison unanimously endorsed).
[34] Nicola Lacey, "From Individual to Group?" in B Hepple and EM Szyszcak (eds), *Discrimination: The Limits of Law* (Mansell 1992) 104.
[35] H Fenwick and TK Hervey, "Sex equality in the single market: New directions for the European Court of Justice", Common Market Law Review, Vol. 32, No. 2, April 1995, 443, 450.
[36] Clare McGlynn, "Social Policy: Equality, Maternity and Questions of Pay", European Law Review, Vol. 21, No. 4, August 1996, 327, 332.

tribute laid at the feet of formal equality. But another, more "substantive" course of action beckoned, one which the ECJ pursued across a series of landmark cases. This course of action was to do away with the test altogether, where discrimination on grounds of pregnancy was alleged, *thus overcoming the absence of a male comparator.* The Court introduced this new approach in a case called *Dekker*, where a woman who had applied for the post of instructor at a training centre for young adults was not appointed on the grounds that she was three months' pregnant[37]. The ECJ stated:

> *"[O]nly women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex."*[38]

In *Webb*, concerning a *dismissal from employment* rather than a *refusal to employ*, the Court stated the position in even more forceful terms:

> *"[T]here can be no question of comparing the situation of a woman who finds herself incapable, by reason of pregnancy discovered very shortly after the conclusion of the employment contract, of performing the task for which she was recruited with that of a man similarly incapable for medical or other reasons... As Mrs Webb rightly argues, pregnancy is not in any way comparable with a pathological condition"*[39].

And, in the same case, Advocate General Tesauro confirmed that this approach was indeed one of "substantive equality"[40], which, in his view, was the outcome sought by those who had drafted the Equal Treatment Directive[41]. *Habermann-Beltermann*[42], about the attempted termination of an employment contract, again on discovery by the employer that the employee was pregnant, completes this important trio of cases in which the ECJ *totally rejects* the need for comparison (as a prerequisite for a finding of discrimination).[43]

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[37] Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941.
[38] Ibid., para. 12.
[39] Case C-32/93 *Carole Louise Webb v EMO Air Cargo (UK) Ltd.* [1994] ECR I-3567, para. 24-25.
[40] Ibid., at 3573 (Para. 8 of the Opinion).
[41] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 39/40.
[42] Case C-421/92 *Gabriele Habermann-Beltermann v Arbeiterwohlfahrt, Bezirksverband Ndb./Opf. e.V..* [1994] ECR I-1657.
[43] The *Habermann-Beltermann* judgment has nevertheless attracted the ire of certain critics for its endorsement of Germany's law prohibiting pregnant women from undertaking night work, especially when this may be the only type of work which they *can* undertake, due to family responsibilities. See Fenwick and Hervey, supra n 35, at 456.

However, other entries in the ECJ's canon of pregnancy cases are less clear-cut, particularly where the topic at hand is *pregnancy-related illness*. In the early case of *Hertz v Aldi*[44], the Court seemed to decide that a pregnancy-related illness, manifesting itself *after the end of maternity leave*, could not be regarded as different from any other illness[45]. Since male and female workers were equally exposed to illness, a woman suffering from such a complaint, *at such a time*, could not allege sexual discrimination if her absences resulted in dismissal (just as they would for a male colleague). But, as carefully explained by Advocate General Ruiz-Jarabo Colomer in his Opinion in *Brown v Rentokil*[46], in the operative part of the *Hertz* judgment, the Court missed out the vital temporal caveat, so that it simply declared that the Equal Treatment Directive

> *"does not preclude dismissals which are the result of absences due to an illness attributable to pregnancy or confinement".*[47]

Inevitably, this led the Court to refuse to make a finding of discrimination where a woman was fired as a result of absences caused by a pregnancy-related illness manifesting itself *before* her maternity leave: *Larsson*[48]. The situation was (at least partially) clarified in the abovementioned *Brown* case, which explicitly overruled *Larsson*. Here, the Court faced the fact that, since a pregnancy-related illness is quite obviously part and parcel of pregnancy itself, to dismiss on the grounds of the former is to all intents and purposes to dismiss on the grounds of the latter, which would be contrary to *Dekker*, *Habermann-Beltermann* and *Webb*. Therefore, the Court held that dismissing a woman as a result of a pregnancy-related illness arising *before* maternity leave, *would* be direct discrimination. However, the Court maintained the distinction based on the moment of first appearance of the illness, such that a pregnancy-related illness arising *after* the end of maternity leave would be treated no differently from any other illness.

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[44] Case C-179/88 *Handels- og Kontorfunktionaerernes Forbund i Danmark [Acting for Birthe Vibeke Hertz] v Dansk Arbejdsgiverforening [Acting for Aldi Marked K/S]* [1990] ECR I-3979.
[45] Ibid., para. 16.
[46] Case C-394/96 *Mary Brown v Rentokil Ltd.* [1998] ECR I-4185.
[47] Case C-179/88 *Hertz*, supra n 44, Operative part of Judgment.
[48] Case C-400/95 *Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Helle Elisabeth Larsson v Dansk Handel & Service, acting on behalf of Føtex Supermarked A/S* [1997] ECR I-2757.

The saga of the pregnancy-related illnesses continued some five months after *Brown* with *Pedersen*[49]. Here, a Danish law resulted in the situation whereby, over a period of six months, a woman absent from work due to a pregnancy-related illness might receive, for the first three months, no pay, and, for the second three months, half pay (assuming, for the purposes of the example, the six months in question were the six months immediately preceding her confinement). Meanwhile, any other ill employee would receive full pay for the entire six-month period. The ECJ followed *Brown* in acknowledging that the disorders and complications arising during pregnancy are to be regarded as a "specific feature of that condition"[50]. Thus, the considerable drop in pay suffered by the woman with the pregnancy-related illness represented discrimination[51]. That said, a woman suffering from so-called "routine... minor complaints"[52], similarly denied pay, was *not* to be regarded as having been discriminated against, that is, if she would not have qualified as ill under the normal test for paid leave.

A final example is the 2005 case of *McKenna*[53]. Here, a pregnant employee of the North Western Health Board, who was absent for almost her whole term owing to a pregnancy-related illness, was downgraded from full pay to half pay after 183 days pursuant to the Board's sick-leave scheme. At the moment that her pay was halved, she was still some two months away from taking maternity leave. Furthermore, the absence caused by the pregnancy-related illness was "set against" her total sick-leave entitlement (365 days per four years). The Court considered that both matters fell within the scope of Article 141 EC[54] and the Equal Pay Directive. However, neither the Article nor the Directive was breached. As regards the halving of the pay, the Court held that it was not necessary to pay women on maternity leave full pay, just as long as such pay as they did receive did not fall to such a level as to "undermine the purpose of

[49] Case C-66/96 *Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Berit Høj Pedersen v Fællesforeningen for Danmarks Brugsforeninger and Dansk Tandlægeforening and Kristelig Funktionær-Organisation v Dansk Handel & Service* [1998] ECR I-7327.

[50] Ibid., para. 33, citing Case C-394/96 *Brown*, supra n 46, para. 22.

[51] Please note that, as (with the exception of the final question) the issue raised in this case was *pay* rather than *treatment*, the Court dealt with it under Article 119 EEC (subsequently Article 141 EC, and now Article 157 TFEU), and Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L 45/19 ("the Equal Pay Directive").

[52] See, for example, Case C-66/96 *Pedersen*, supra n 49, para. 42.

[53] Case C-191/03 *North Western Health Board v Margaret McKenna* [2005] ECR I-7631.

[54] As it then was – now Article 157 TFEU.

maternity leave"[55]. From this the Court reasoned that it could not be illegal for a woman who is absent during her pregnancy by reason of a pregnancy-related illness to suffer a reduction in pay either, subject to a similar proviso. As regards the offsetting of the absences against the total sick-leave entitlement, the Court held that if it was possible for an employer to reduce pay during pregnancy, it must be possible for an employer to allow such offsetting too.

3.4.2. Preliminary Analysis

The foregoing case-law illustrates not only that the running of a "like for like" test can entail problems, but that, in the case of pregnancy, these problems are so insuperable as to necessitate the relinquishing of the test altogether. The abandoning of comparison in the *Dekker* case is certainly an achievement in the quest for substantive equality[56], and many would regard it as only the first step in a much longer journey. But the ECJ seems reluctant to develop its doctrine of "noncomparative discrimination" much beyond what might be called "pure pregnancy" cases.[57] Even in the adjacent field of pregnancy-related illness, the ECJ has rushed to recover its fallen safety blanket.[58] As Ellis has put it, referring to *Hertz v Aldi*:

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[55] *McKenna*, supra n 53, para. 50. In reaching this conclusion the Court was inspired by the earlier case of *Gillespie* (Case C-342/93 *Joan Gillespie and others v Northern Health and Social Services Boards, Department of Health and Social Services, Eastern Health and Social Services Board and Southern Health and Social Services Board* [1996] ECR I-475), as well as the Directive on the Protection of Pregnant Workers (Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1992] OJ L 348/1).

[56] "By recognising that difference matters in itself and requires changes in the way it is dealt with, in order to eliminate the disadvantage historically resulting from difference, Community law is clearly paying a debt to the feminist legal theory that has disentangled the principle of equality from comparative evaluation": M Barbera, "Not the same? The Judicial Role in the New Community Anti-Discrimination Law Context" (2002) 31 Industrial Law Journal 82, 90-1, footnotes omitted, extracted in A McColgan, *Discrimination Law: Text, Cases and Materials* (2nd edn Hart Publishing, Oxford 2005) 26.

[57] Although note its recent (slight) expansion of the doctrine to include cases of in vitro fertilisation, even prior to the transferring of the fertilised ova to the uterus: Case C-506/06 *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG* [2008] ECR I-1017.

[58] Also in the field of maternity pay. In *Boyle*, the employer offered pregnant workers three months and one week maternity leave on *full pay*, which was more than required by law, but only on condition that the excess be repaid if the woman in question failed to return to work afterwards. No such condition was imposed on those taking sick leave. However, utilizing a comparative approach, the Court held the two situations to be different, and thus upheld the contested clause: Case C-411/96 *Boyle v Equal Opportunities Commission* [1998] ECR I-6401.

> *"At one level of abstraction, a "pregnancy-related illness" can be said to be something from which a person cannot suffer but for her female sex; at another level of abstraction, it can be said that "illness" can be suffered alike by either sex."*[59]

The Court in *Hertz v Aldi* chose to employ the second of these two "levels of abstraction", thus providing a nice example of what in cinematographical terms might be called "zooming out", that is, the taking into account of fewer attributes rather than more. Ms Hertz and her hypothetical male comparator are both "ill", rather than Ms Hertz being "ill and (formerly) pregnant" and the comparator being "ill but not (formerly) pregnant". In this way, Ms Hertz and the comparator can be regarded as "like", and can receive the same treatment without violating the equality principle.

Of course, as has been seen, the matter was a long way from resolved, with the final position being (roughly) that, in the case of pregnancy-related illnesses arising prior to the taking of maternity leave, the noncomparative approach would be employed, and, in the case of pregnancy-related illnesses arising after maternity leave, the comparative approach would be employed. Only a few months after the birth, then, a new mother is *abstracted out* of her specific context (new motherhood, including the risk that a pregnancy-related illness may materialize). At first glance, the choice of the last day of maternity leave for this switch from "incomparable" to "like" seems a little arbitrary, the coldly legal rationale being, of course, that this day marks the end of the special "protection" afforded to pregnant women[60]. Doubts also linger as to how strictly this line-in-the-sand is being policed. In *McKenna*, for example, it was held that absences resulting from a pregnancy-related illness *could* be set against the employee's total sick-leave entitlement, *without* this amounting to discrimination[61]. Although *Hertz* and *Brown* are cited as authority, Ms McKenna's absences were quite

[59] Evelyn Ellis, "The definition of discrimination in European Community sex equality law", European Law Review, Vol. 19, No. 6, December 1994, 563, 567.

[60] This word borrowed from Article 2(3) of the Equal Treatment Directive, subsequently Article 2(7) of Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (the "New Equal Treatment Directive") [2002] OJ L 269/15. Most recently the word can be found at Article 28(1) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (the "Recast Directive") [2006] OJ L 204/23.

[61] Please note that this finding was contrary to the Opinion of Advocate General Léger.

obviously *prior* to her maternity leave. For the employer to be allowed to include these in some future aggregate calculation, pursuant to the sick-leave scheme, is surely tantamount to declaring that absences on the grounds of pregnancy-related illness, prior to maternity leave, are no different from (in other words, are "like") absences on the grounds of any other illness. This seems to be a return to the position in *Larsson*, which *Brown* had supposedly overruled.

The Court's approach to the distinction between pregnancy-related illness and illness unrelated to pregnancy has been erratic in other ways. *Brown* appeared to state once and for all that a woman suffering from a pregnancy-related illness and a man suffering from some other illness were *not* alike, as regards vulnerability to dismissal (at least until the abovementioned line-in-the-sand was reached). But, since *Pedersen*, it has emerged that a woman suffering from a pregnancy-related illness and a man suffering from some other illness *are* alike, as regards right to pay, and level of pay. It is worth considering the two cases in the light of the table at Appendix I. In *Brown*, Ms Brown (Comparator 1) faced dismissal after twenty six weeks of absence, pursuant to a contractual clause. Any male employee (Comparator 2) would face exactly the same rule. This was *like* treatment, for the purposes of Column 2. So if the Court *wanted* to arrive at a finding of discrimination, it had to declare Comparator 1 and Comparator 2 to be *unlike*. The rule was then "applied in the same way to different situations"[62], thus constituting direct discrimination[63]. However, in *Pedersen*, the factual set-up was different. Here, Ms Pedersen (Comparator 1) faced three months on no pay and three months on half pay, in the six months leading up to her confinement, pursuant to Law No. 516 of 23 July 1987. Meanwhile, a male employee who fell ill (Comparator 2) would enjoy six months on full pay, pursuant to the same law. This was *unlike* treatment. So, now, if the Court wished to arrive at a finding of discrimination, it was going to have to declare the two Comparators to be *like*. In fact the Court used noncomparative discrimination to get around this problem[64]. However, the important point is that the ECJ could not repeat its remark from *Brown* about those suffering from pregnancy-related illnesses and those suffering from other illnesses being in "different situations", because, given the factual situation of the *Pedersen* case,

[62] Case C-394/96 *Brown*, supra n 46, para. 31.
[63] Ibid., para. 32.
[64] Case C-66/96 *Pedersen*, supra n 49, para. 35.

this would amount to unlike being treated in unlike fashion, which could not, ipso facto, be discrimination.[65]

The distinction between a pregnant (female) worker and a non-pregnant (male) worker has also been problematic. In *Gillespie*[66], for example, where seventeen plaintiffs who took maternity leave during 1988 complained that they did not enjoy the benefit of a (back-dated) pay rise announced at the end of that year, the Court held that no provision of EC law "required that women should continue to receive full pay during maternity leave"[67]. However, a woman on maternity leave *should* receive a pay rise awarded during that period, because "[t]o deny such an increase... would discriminate against her purely in her capacity as a worker since, had she not been pregnant, she would have received the pay rise"[68]. Why only apply this reasoning to the second limb of the judgment (the pay rise), and not also to the first limb (the "normal" pay)? In other words, in the same case, two comparisons are run. The *same person* (let her be A) is *both* "pregnant worker", and thus *incomparable with* B (a man), *and* "worker", and thus *like* B (such that, when treated in unlike fashion, as when B benefits from a pay rise but A does not, there is discrimination). Thus, the sort of adjustment referred to at the beginning of section 3.1 can be seen clearly here, carried out in the space of a single case.

Turning finally to the doctrine of noncomparative discrimination itself, this has been discussed at length in other works[69]. From a linguistic point of view, the doctrine seems at the very least paradoxical. "Discrimination" comes from the Latin word *discrimen*, meaning "distinction"[70]. A thing cannot be distinguished

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[65] Indeed, by the time of the *McKenna* case, the Court had to acknowledge that there was one rule for dismissals, and another rule for pay: see Case C-191/03 *McKenna*, supra n 53, para. 58. The (implicit) equation of those suffering from pregnancy-related illnesses and those suffering from other illnesses in *Pedersen* (as regards pay, at least) led, in that case, to a levelling up of the situation in favour of those suffering from pregnancy-related illnesses. But note how, by the time of *McKenna*, this same equation could be used to level *down*, that is, to subject women with pregnancy-related illnesses to *worse* treatment than they might otherwise have expected.

[66] Case C-342/93 *Gillespie*, supra n 55.

[67] Ibid., para. 20. The Court was clearly inspired here by the Directive on the Protection of Pregnant Workers (also cited at supra n 55), which only calls for the payment of an "adequate allowance" (Article 11). However, this Directive did not apply ratione temporis to the *Gillespie* case.

[68] Ibid., para. 22.

[69] For example, T Macklem, *Beyond Comparison: Sex and Discrimination* (CUP, Cambridge 2003) 16-19; Elisa Holmes, "Anti-Discrimination Rights Without Equality" (2005) 68(2) MLR 175, 186-7.

[70] CT Onions (ed), *The Shorter Oxford English Dictionary* (3rd rev edn Clarendon Press, Oxford 1973) 564.

by itself, but only (it is submitted) in relation to something else.[71] Put another way, anti-discrimination law proceeds along the lines of what has been called "pair-wise comparison". "Singleton-wise comparison" would simply not work; a thing cannot be compared on its own[72]. However, many words have evolved away from their original meanings, so perhaps one should not set too much store by linguistics.

However, other problems remain. If a pregnant woman is incomparable, making any adverse treatment an instance of sex discrimination, what happens when an employer favours a non-pregnant woman over a pregnant one? The latter has suffered sex discrimination even though both the advantaged party and the disadvantaged party are female. There may thus be a need to differentiate sex discrimination from *pregnancy* discrimination.

Perhaps the last word should be given to Ellis, whose opposition to the abandonment of comparison is well-known:

> *"It is submitted that an element of comparability is important to the component of adverse impact; if direct discrimination is defined simply as "nasty treatment" on the ground of sex, enormous discretion is placed in the hands of courts and tribunals, who remain overwhelmingly male in composition, to decide what is to the detriment or advantage of complainants, the majority of whom are female. For reasons of objectivity, it is preferable if the adversity of the treatment received by the complainant is measured by means of a comparison with the treatment received or receivable by a member of the opposite sex, placed in broadly the same circumstances as the complainant."*[73]

3.4.3. A Walzerian analysis

A Walzerian perusal of the same case-law reveals that complex equality can help to render the judgments more consistent and less confused, and can also offer a solution to the "noncomparative discrimination" problem.

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[71] See, for a strong defence of this position, R Wintemute, "When is Pregnancy Discrimination Indirect Sex Discrimination?" Industrial Law Journal, Vol 27, No 1, March 1998, 23: "Claims of discrimination without comparison are impossible" (at 25).

[72] Unless the comparison is, for example, between the thing as it is and the thing as it might be: Macklem, supra n 69, 141.

[73] Supra n 59, 571-2. For criticism of this statement, see, for example, GF Mancini and S O'Leary, "The New Frontiers of Sex Equality Law in the European Union" European Law Review, Vol. 24, No. 4, August 1999, 331, 338.

The starting point for a Walzerian scrutiny of the *Dekker* case would be the ascertaining, by the relevant distributive community, of the shared meaning of the post of instructor. This would likely include some element of aptitude or competence (for example, in the training of young adults), but would almost certainly not include any consideration of whether or not the post-holder was pregnant. The inclusion of such a consideration in the fundamentum distributionis, then, breaches Walzer's rule that the distributive principle of any good must follow from its shared meaning. Complex equality having been contravened, the Walzerian analyst, like the Court, would find for Ms Dekker. The same result, mutatis mutandis, would be achieved in *Webb* and *Habermann-Beltermann*.

The holy trinity of the ECJ's pregnancy case-law remaining untouched, then, how would the Walzerian analyst deal with the other cases mentioned above? Here the results are not so clear-cut, as they turn on shared meanings which are hard to forecast. In *Brown*, for example, the distribuend is continued employment with Rentokil[74]. The company seems to be asking two questions of potential distributees, the first question being: do you have the ability to do the job? The second question, however, is: are you free from pregnancy-related illnesses?[75] The distributive community would probably see the meaning of the good at hand in terms of the first question only, and this would then determine the correct fundamentum distributionis: continued employment should go to those who are able to do the job. As in *Dekker*, inclusion of an alien element within the fundamentum distributionis would flaw the distribution and render it

[74] Or, looked at the other way round, dismissal.

[75] A possible third question is, are you available to do the job? The distributive community *might* think it was fair that availability to do the job formed part of the shared meaning thereof, such that, in a case like *Mahlburg*, statutorily-enforced non-availability on grounds of pregnancy might be legitimately taken into account: Case C-207/98 *Silke-Karin Mahlburg v Land Mecklenburg-Vorpommern* [2000] ECR I-549. However, it also seems fair that a short-term absence should not be allowed to defeat a long-term contract (this was the reasoning in *Habermann-Beltermann*, followed in *Mahlburg*). This is a classic clash-of-meanings, then, as between the distributor and the distributee. It is true that, under orthodox complex equality, the final word would rest with the distributive community, possibly leaving pregnant women hostage to factions within a community which were hostile to working mothers. However, under the alternative proposal of mediated complexity, this balancing act would be the sole job of the Bench, which might even be able to operate a kind of "hardship rule" to decide between conflicting meanings. Clearly, an entire lost career would outweigh a few months of lost revenue. See below section 8.3., and in particular footnote 34.

complexly inegalitarian; pregnancy would effectively become a negative dominant.[76]

The same two questions are asked of the employee by Aldi in *Hertz v Aldi*, the only difference being that in *Brown* the illness arose before maternity leave, while in *Hertz* it arose *after* maternity leave. Although the Court saw a difference, it is not clear that the Walzerian analyst would, meaning that the result for the latter would be identical to that reached in *Brown*, mutatis mutandis.

Returning to *Brown*, it is just conceivable that some members of the community might argue that those with pregnancy-related illnesses were too ill to do the job, *ergo* were not able to do the job; in other words, even without the second question, they would argue, the potential distributee's state of health is part of the meaning of the good and, consequently, a part of the way it should be distributed. However, this definition of employment (continued or *ab initio*) is problematic, and overlaps with other debates which the same forum would have had, or would have to have in the future, about the very meaning of *a job*, debates which would have to take in at least a hundred years of developments in social protection, employment law, and workers' rights generally. In a nutshell, a job is not just an acquisition of labour-power by the employer to achieve his or her (economic) ends, but is also a means of livelihood (usually the sole means of livelihood) for the employee and his or her family. It is unjust to simply cast him or her aside if he or she falls ill, not to mention dangerous, as ill employees struggle to conceal their medical problems and work on, for fear of losing their livelihoods. Paid sick leave is now mandatory for employers, and so dismissal on the grounds that someone has fallen ill is illegal.[77] Going back to the *Brown* case, then, those who included the potential employee's state of health in the meaning of continued employment would have to do so across the board: no job would be open to the ill, and all employees *becoming* ill during their employment could be sacked on the spot. This is *very unlikely* to be a viewpoint widely held within the distributive community as a whole.

[76] Or a positive dominant if the distribuend was taken to be dismissal.

[77] That is, *immediate* dismissal; as time goes on, dismissal *may* become a legitimate option for the employer. See the paragraph-after-next.

The most likely scenario, then, is that the distributive criterion adopted by Rentokil would be found to be at odds with the shared meaning of the distribuend, meaning that the Walzerian analyst, like the Court, would find for Ms Brown. Pregnancy-related illnesses have nothing whatsoever to do with the performance of pest control services.

This logic would seem to be applicable whether the pregnancy-related illness manifested itself before or after confinement/ maternity leave, but it is crucial to know if pregnancy-related illnesses are to be treated the same as other types of illnesses, or if they are to be accorded special protection. Could an employee's contract be terminated on the strength of periods of absence caused by a pregnancy-related illness, and, if so, would the requisite qualifying period begin to run from the beginning of the first leave of absence taken after the illness had manifested itself? Assuming that that was the case, the employee's dismissal after, say, 26 weeks would be entirely legal, even though it would be, to all intents and purposes, dismissal on the grounds of pregnancy. It would be for the distributive community to work out these arrangements, but, as at the end of the paragraph-before-last, it seems highly unlikely that the entire community, made up as it will be of men and women a large number of whom will want to start their own families, would agree to meanings of employment or continued employment which stipulate that employees must have a clean bill of health, where the term "clean bill of health" includes freedom from pregnancy-related illnesses. While illnesses may *eventually* gain a legitimate status within the sphere of employment (much like intelligence within the sphere of education), such that any *eventual* inequalities based on ill-health would themselves be legitimate ("small inequalities"), any mention within the discussions of pregnancy should sound an urgent alarm. "This is a major boundary – a boundary with the sphere of family and with the sphere of rights, to name but two", such an alarm should say, "not just now but always." Pregnancy's status within the sphere of employment should be illegitimate *always*.[78] This would mean that pregnancy-related illness could *never* feature in a fundamentum distributionis without causing a boundary breach and flawing the distribution. To answer the question posed at the beginning of this paragraph, this would hopefully give *special* protection to those suffering from pregnancy-related illnesses not just before confinement/ maternity leave, but afterwards too. While it might be acceptable

[78] Except in the very rare situation that the job at hand required the post-holder to be pregnant, in other words, that pregnancy was *brought into* the shared meaning of the distribuend.

to fire an employee suffering from a "regular" illness after, say, 26 weeks, it would not be acceptable to fire an employee suffering from a pregnancy-related illness after that period, or (subject to the distributive community's agreement) at all. This would separate those suffering from "regular" illnesses and those suffering from pregnancy-related illnesses, and sick leave taken by the latter could not be used as grounds for termination of the employment contract.

Considering *Pedersen*, here the very comparison being made was between a woman suffering from a pregnancy-related illness, and any other (hypothetical) ill employee. Complex equality would require that the woman suffering from the pregnancy-related illness receive the *same* salary as the woman (or man) suffering from a "regular" illness, namely full pay. This conclusion mirrors that reached by the Court.

Turning to *McKenna*, it again seems probable that the distributive community as a whole would omit the reference to pregnancy, in ascertaining its shared meaning of pay and benefits, which North West Health Board includes in its distributive criterion. This difference of opinion would lead, as before, to an infringement of complex equality. It is worth noting how this verdict clashes with that of the Court, which held that inferior pay for those on maternity leave, and by extension for those absent by reason of a pregnancy-related illness, was *not* discriminatory.

Another very interesting point about *McKenna* is that it shows nicely how Walzer's theory can be used non-comparatively, that is, a complainant does not need a comparator in order for their situation to be assessed – breaches of complex equality (or otherwise) can be deduced form observing the situation and circumstances of one person alone. Ms McKenna cannot point to any *particular* comparator. There are options, naturally, such as a woman on maternity leave, a non-pregnant woman absent by reason of "traditional" illness, a man absent by reason of "traditional" illness, and so on. However, it is not obvious which of these the comparator should be. Walzer's theory, meanwhile, allows her predicament to be exposed to the light of day without comparison being necessary, and the boundary breach, between the spheres of family and employment[79], is immediately evident.[80] Her "nasty treatment", to use Ellis'

[79] Or rights and employment.

phrase[81], can be seen, and without undue discretion having to be afforded to the (possibly male) judges.

Finally, in *Gillespie*, the distributive community's shared understanding of a back-dated pay rise, and its shared understanding of pay itself, would determine how these things are to be distributed. These understandings may or may not make exceptions for those on maternity leave. If they do, then pregnancy's presence within the distributive sphere becomes legitimate. But if they do not, then, as explained above, it would be illegitimate, representing a breach of boundaries and causing the distributions at issue to be flawed. What seems likely, though, is that one shared meaning would make special allowance for pregnant women, while the other would not. Thus use of a Walzerian approach to equality would avoid the sort of fractured result which the Court arrived at, finding discrimination in the case of the back-dated pay rise but not discrimination in the case of pay itself.

3.5. Pensions

3.5.1. Case-law

For many years, Member States finding themselves before the Court tried to rely on derogations vis-à-vis national pensionable ages, for example, at Article 7(1)(a) of the Social Security Directive[82], and at Article 9(1)(a) of the (at that time) new Occupational Social Security Directive[83]. The ECJ on the other hand largely ignored this and often seemed indirectly to be impugning discrimination in a State's determination of pensionable age for the purposes of granting old-age pensions. However, a crucial complication in the ECJ's case-law on

[80] Hopefully, then, Walzer's theory answers Patricia Cain's call "to move beyond equality, which inevitably compares women to men, and to focus on women themselves": PA Cain, "Feminism and the limits of equality" 24 Ga L Rev 1989-1990, 803, 806.
[81] See supra, text accompanying n 73.
[82] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L 6/24.
[83] Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1986] OJ L 225/40. This was later updated by Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1997] OJ L 46/20. Both of these have now been overtaken by the Recast Directive.

pensions emerges where the difference brought before the Court is not a difference in normal pensionable ages for men and women, but a *second* difference which *subsumes* the first.

This complication can be seen in the early case of *Burton v British Railways Board*[84], in which the Board undertook an "internal reorganization", as a result of which it offered voluntary redundancy to male workers aged 60 and female workers aged 55. Mr Burton, aged 58, applied for voluntary redundancy but was rejected. Performing the "like for like" test in order to ascertain whether or not there had been discrimination, the Court faced two ways of looking at the Board's offer. The first way of looking at the Board's offer was as follows. For a male worker to be eligible for the payment of the voluntary redundancy benefit, he must have reached the age of 60, while for a female worker to be eligible for the payment of a voluntary redundancy benefit, she must have reached the age of 55 (the "first formulation"). On the first formulation, one could simply declare the offer to be a case of like workers, treated in unlike fashion. However, one could also conclude that both kinds of worker were eligible for the payment of the voluntary retirement benefit if they applied *within 5 years preceding* their normal minimum age of retirement. On this, second formulation, which the Court in *Burton* preferred, both kinds of worker were treated the same, that is, likes were treated alike. There was thus no discrimination.

The second formulation could be called a "relative formulation". While the first formulation is based on two, fixed numbers (60 and 55), the second formulation is based on one number (5), but this number is relative to two other, fixed numbers (65 and 60). The comparison, which appears to disclose no discrimination, is thus in reality relative to an existing distribution, which *is* discriminatory[85].

It is easy to think of other examples. Suppose two men, A and B, both go to see a doctor for a vaccination prior to a foreign trip. The doctor wishes to see the patients *one year after* the first injection for a booster. It would not make sense to make the second appointments of A and B on the same date, if the first

[84] Case 19/81 *Arthur Burton v British Railways Board* [1982] ECR 554.

[85] A relative formulation does not in fact have to contain any numbers as long as the distribution is based, for all comparators, on a single concept, the which concept on closer inspection varies significantly from one class of comparator to the next. For this reason, the use of relative formulations is a popular method of practicing *indirect discrimination*.

appointments of A and B were on different dates. The original disparity here is functional. Even a one-hundred-metre race does not require all runners to finish at precisely the same spot, just *one hundred metres from* their respective starting points. Calling it a "one-hundred-metre race" disguises the underlying disparities among the starting points; but, again, these disparities are functional.

So the problem in *Burton* is not the taking into account of less or more attributes. There are two attributes per worker whichever of the two "ways of looking" is employed: their gender, and then, either, their actual age of qualification for the voluntary redundancy benefit, or, the relative formulation of "five years from normal retirement age". But, if the latter, this "attribute" smuggles into the comparison a (disguised) difference. It is submitted that this difference is illegitimate[86], making the use of the disguise effectively a trick. In the doctor and race examples above, the hidden differences are functional and the use of the relative formulation is justified by a desire for clarity and ease. The (hidden) different numbers are actually irrelevant. It is the (given) same number which is relevant. The same cannot be said for *Burton*[87].

Four years after *Burton* came *Roberts v Tate & Lyle*[88]. Here, Ms Roberts found herself made redundant at the age of 53 under a mass redundancy; she was a member of Tate & Lyle's "contracted out" occupational pension scheme (that is, contracted out of the State retirement pension scheme). Under the final severance terms, all employees made redundant were to be offered either a cash payment or an early pension, in other words, pensions were immediately

[86] One of the supposed purposes of the pensionable age difference in the UK was apparently "to enable a married couple to retire at the same time (it being assumed that husbands were normally slightly older than their wives)": Evelyn Ellis, *EU Anti-Discrimination Law* (Oxford EC Law Library, OUP Oxford, 2005) 380. Such an assumption does not function in a 21st century world where age differences between brides and grooms vary considerably. It also takes no account of same-sex partnerships, or those workers who for whatever reason are single when they retire. That said, other, more credible purposes have been suggested for the difference. In the *Pension Reform* case of 1987, for example, the German Constitutional Court held that women should be allowed to retire earlier than men because of the "double burden" which they endured from pregnancy and child care: 74 BVerfGE 163 (1987). See further DP Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd edn Duke University Press, Durham and London 1997) 295.

[87] For further criticism of the *Burton* decision, see, for example, T Millett, "Sex equality: the influence of Community law in Great Britain" Yearbook of European Law 1986, 06, 219, and "European Community law: sex equality and retirement age" International and Comparative Law Quarterly 1987, 36/03, 616.

[88] Case 151/84 *Joan Roberts v Tate & Lyle Industries Limited* [1986] ECR 703.

payable to *both* men *and* women *over the age of 55.* Ms Roberts pleaded discrimination.

Roberts v Tate & Lyle acts as a kind of obverse to *Burton*. Clearly, what Ms Roberts wanted was for the ECJ to view the severance terms on what in *Burton* had been the second formulation, that is, employing the technique of the "relative formulation". It would then see that the relative formulation (seemingly) employed by Tate & Lyle had been: "Pensions should be immediately payable to male workers who are *ten years away from* the normal State pensionable age, and to female workers who are *five years away from* the normal State pensionable age". Ms Roberts hoped that the Court would find this to be discriminatory, and call for its replacement with a non-discriminatory relative formulation such as: "Pensions should be immediately payable to all workers who are ten years away from the national pensionable age". This would produce the result that early pensions would be accorded to men aged 55, but also to *women aged 50*, thus bringing her within the scope for an immediate pension. But the ECJ, having been only too glad to endorse the relative formulation in *Burton*, now seemed to turn against the idea of relative formulations. Covert differences should be exposed to the light of day. On this reading, of course, Tate & Lyle's severance terms seemed egalitarian (65 minus ten was 55; 60 minus five was 55). This could *not* be discrimination because it was "the grant of a pension to persons *of the same age* who are made redundant" and amounted merely to "a collective measure adopted irrespective of the sex of those persons in order to guarantee them all the same rights"[89].

It was *Tate & Lyle*, then, which had refused to ossify an original disparity here (namely the disparity in the State pensionable ages)[90]. But was the Court, by *endorsing* this, subtly showing *its* disapproval for the original disparity? And is it not merely a cosmetic remedy to equalize a secondary difference, while leaving the original difference intact? Does it even make sense?[91]

[89] Both quotations from ibid., para. 36 (emphasis added).

[90] In fact, Tate & Lyle *had* ossified the original disparity in the first version of the severance terms. However, its male workers, who would not then have received their early pensions until the age of 60, had complained. See ibid., para. 5.

[91] Such a course of action is akin to the abovementioned doctor making the second appointments of both of his patients on the same date.

Another four years passed, and the Court was confronted with the case of *Barber v Guardian Royal Exchange*[92]. Mr Barber had worked for Guardian Royal Exchange ("Guardian"), and its predecessor company, since 1948. A member of Guardian's Pension Fund (another contracted-out occupational pension scheme), he found himself dismissed by reason of redundancy at the age of 52. However, according to Guardian's Guide to Severance Terms, those made redundant *up to ten years preceding* their normal pensionable age would receive an immediate pension. Those who had not yet attained this age (namely, 55 for men and 50 for women) would have to make do with a so-called "deferred pension". The English Court of Appeal asked the ECJ whether it was discriminatory that where a man and a woman of the same age were made compulsorily redundant in the same circumstances, the woman received an immediate pension while the man received only a deferred pension.

The Court held that the age condition in Guardian's Severance Terms *infringed* Article 119 EC[93] "even if the difference between the pensionable age for men and that for women is *based on* the one provided for by the national statutory scheme"[94]. Relative formulations were thus driven out once and for all, or so it seemed.

Three years after *Barber* came *Birds Eye Walls v Roberts*[95]. Here, Mrs Roberts, a packer for Birds Eye Walls, was affiliated to Unilever's (contracted out) occupational pension scheme. Pursuant to this, those who were compelled on the grounds of ill health to take early retirement before reaching the statutory State pensionable age would receive from the employer an ex gratia payment called a bridging pension. This included an amount corresponding to a proportion of the State pension. However, from the age of 60 onwards, a *female* worker received a *smaller* bridging pension, on the grounds that she was now *in receipt of the State pension itself*. Mrs Roberts alleged that this was a breach of Article 119 EC[96].

[92] Case C-262/88 *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889.
[93] As it then was – subsequently Article 141 EC, and now Article 157 TFEU.
[94] CaseC-262/88 *Barber*, supra n 92, para. 32 (emphasis added).
[95] Case C-132/92 *Birds Eye Walls Ltd. v Friedel M. Roberts* [1993] ECR I-5579.
[96] As it then was – subsequently Article 141 EC, and now Article 157 TFEU.

Neither the Advocate General (Van Gerven AG) nor the Court agreed with Mrs Roberts. Advocate General Van Gerven was swayed by an argument of the Commission's that Birds Eye Walls

> *"is attempting to achieve substantive equality between the sexes by compensating for an inequality (difference in pensionable ages)"*[97].

In other words, although Birds Eye Walls' behaviour in granting the relevant female workers less once they reached the age of 60 is an instance of inequality, it is designed to remove or prevent[98], or compensate for[99], another inequality, namely the fact that, without this reduction, men would receive less than their female counterparts between the ages of 60 and 65[100]. The second inequality is, as the quotation from the Report for the hearing above shows, merely the difference in State pensionable age (in the UK), by another name. After quickly distinguishing *Barber*, the Advocate General concludes that Birds Eye Walls' aim is actually to *ensure* equal pensions for men and women[101]. The discrimination is thus justified, and Article 157 TFEU is *not* breached[102].

The Court goes slightly further in that it refuses to make a finding of discrimination at all. Recalling the "like for like" test, the ECJ declares that,

> *"the general principle of equal treatment laid down by Article 119 of the Treaty... presupposes that the men and women to whom it applies are in identical situations"*[103].

But the financial position of a woman compelled on the grounds of ill health to take early retirement is *not* comparable to that of a man in the same situation, *between the ages of 60 and 65*[104]:

> *"That difference as regards the objective premise, which necessarily entails that the amount of the bridging pension is not the same for men and women, cannot be considered discriminatory."*[105]

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[97] Ibid., at 5586 (Section II-3 of the Report for the hearing).
[98] Van Gerven AG's choice of verbs: ibid., at 5595 (Para. 16 of the Opinion).
[99] The Commission's choice of verb: ibid., at 5586 (Section II-3 of the Report for the hearing).
[100] When the female counterparts would receive bridging pension *plus* State pension, while they (the men) would receive bridging pension *only*.
[101] Case C-132/92 *Birds Eye Walls*, supra n 95, at 5596 (Para. 17 of the Opinion).
[102] Ibid., at 5596 (Para. 18 of the Opinion).
[103] Ibid., para. 17. Article 119 EC subsequently became Article 141 EC, and now Article 157 TFEU.
[104] Ibid., para. 20.

Thus, Birds Eye Walls' behaviour in reducing the amount of the bridging pension granted to the relevant female workers, after they reach the age of 60, does not breach Article 157 TFEU.[106]

The Court has thus lurched back to its earlier position of favouring relative formulations[107]. But, going back to the analysis of *Burton* above, is the use of this relative formulation a "trick" to perpetuate a (non-functional) disguised difference? Both the Advocate General and the Court would appear to reply to this question in the negative. Birds Eye Walls, they would argue, far from playing a trick to perpetuate the UK's difference in pensionable ages, is actually trying to *fashion* the uneven landscape in which it finds itself, to *generate* evenness: fighting fire with fire, as it were. And, of course, applying a second inequality to an existing situation of inequality in order to bring about equality is not new: it is, as the Commission rightly stated[108], substantive equality.

Nevertheless, this is a troubling result, because, as Mrs Roberts correctly pointed out, Birds Eye Walls is "rely[ing] on differences in pensionable age for national schemes [which] is tantamount, in effect, to relying on discrimination based on sex"[109]. And the Court *had* stated in *Barber* that Article 119 EC[110] prohibited any discrimination with regard to pay as between men and women, whatever the system employed, even if said system is "based on... the national statutory scheme"[111].

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[105] Ibid.

[106] Ibid., Para. 21.

[107] Although, as the Advocate General nicely describes, the facts of this case lend themselves to both a non-relative and a relative reading, the former leading to a conclusion of direct discrimination, and the latter leading to a conclusion of indirect discrimination: "[I]t is possible to focus on the fact that the appellant pays to all female ex-employees aged between 60 and 65 a lower bridging pension than to their male counterparts [non-relative formulation]… By the same token, however, emphasis can be laid on the fact that it calculates the bridging pension for all its ex-employees in the same way, namely by deducting from their [gross retirement pension] such pension payments as they can claim from the State or from Unilever [relative formulation]". Ibid., at 5593 (Para. 13 of the Opinion).

[108] Ibid., at 5586 (Section II-3 of the Report for the hearing); see also ibid., para. 15.

[109] Ibid., at 5585 (Section II-2 of the Report for the hearing).

[110] As it then was – subsequently Article 141 EC, and now Article 157 TFEU.

[111] Case C-262/88 *Barber*, supra n 92, para. 32. The Court again appears to go back on *Barber*, thus upholding *Birds Eye Walls*, in the more recent case of *Hlozek*, where a difference as between the ages at which men and women were to be awarded bridging allowances, prima facie based on the respective Austrian pensionable ages, was endorsed: Case C-19/02 *Viktor Hlozek v Roche Austria Gesellschaft mbH* [2004] ECR I-11491.

A second note of caution must also be sounded. The Court relies on the assumption that a female worker like Ms Roberts *receives a State pension in the first place*. But this is not necessarily the case. In the UK, married women who worked were given two options, the first being to pay their national insurance contributions at the full rate and then to receive a full State pension in their own right, and the second being to pay national insurance contributions at a *reduced* rate, but to receive a reduced State pension (or no State pension at all) when pensionable age was reached. In the precise circumstances of the case, Ms Roberts had taken the second option and therefore was not in receipt of a State pension, although, fortuitously, she *was* in receipt of a widow's pension, which was equal in amount. The Court had been asked about the possibility of a claimant having no State pension to countervail, as it were, the reduction in the bridging pension, but took a most dismissive line on this, holding that the two options were "a matter in which married women… have freedom of choice"[112]. The Court's reasoning then becomes confused, with the judges first saying that they would not look to actual amounts when ruling on this kind of discrimination[113], but later – apparently – taking account of Mrs Roberts' receipt of a widow's pension in this case[114]. The worry is that another female claimant, identical to Mrs Roberts but for the fact that her husband was still alive, would have found herself at 60, with no State pension or widow's pension, but facing a massive drop in the bridging pension which was her only means of support. The Court's ruling is only logical as long as the one thing replaces the other. As soon as there is no replacement, discrimination as between a female claimant and a male comparator, still in receipt of the full bridging pension, is obvious.

3.5.2. A Walzerian analysis

A Walzerian reading of the same pensions cases reveals two agreements with the Court, and two disagreements; it also suggests a greater degree of consistency when Walzer's test is applied than would be the case under Aristotle.

[112] Case C-132/92 *Birds Eye Walls*, supra n 95, para. 27.
[113] Ibid., para. 28.
[114] Ibid., para. 31.

In *Burton*, the result would depend on the relevant distributive community's shared understanding of a voluntary redundancy benefit. This community would have to decide if the most important thing was that all workers should receive it at the same biological age (say, 55 – the "biological age understanding"), or if the most important thing was that all workers should receive it in the 5-year period immediately preceding their national pensionable age. If the meaning is to provide a safety net for those workers who are selected for voluntary redundancy, then the availability of the benefit in the run-up to the attainment of the national pensionable age, in other words, in the period during which redundancy is most likely to take effect, is critical (the "run-up rationale"). This would suggest that the second of the above two options is the better, or at least the more logical, one, but of course it would be up to the community. However, one cannot help thinking that this might merely be a case of setting the rules within a well-defined and autonomous distributive sphere, meaning that any inequality that emerged in the final agreement would be a small inequality only, not a boundary breach.[115] It appears, then, that the Walzerian analysis of the case would not produce a different outcome from the Aristotelian one. If it is presumed (subject to confirmation by the distributive community) that there is no boundary breach here, and therefore no violation of complex equality, it can be seen that this is an identical conclusion to the one reached by the Court, namely, that there was no discrimination in evidence in British Railways' arrangements for voluntary redundancy.

Roberts, on the other hand, is an example of a case where the Walzerian analyst would (or at least might) reach a different verdict to the one reached by his or her Aristotelian counterpart. The case, as has already been seen, is a model of the confusion produced by the "like for like" test, since both of the interpretations of Tate & Lyle's pension scheme (that of Tate & Lyle, and that of Ms Roberts) appear to satisfy it. Tate & Lyle sees an instance of likes treated alike (both a woman aged 53 and a man aged 53 would fail to acquire the early pension). Ms Roberts, meanwhile, sees an instance of likes treated unlike (a man seven years below his national pensionable age would acquire the pension,

[115] But this would come down to whether the *reason* for the inequality was intrinsic to the sphere of voluntary redundancy benefits (as the run-up rationale would be) or extrinsic thereto. A reason which turned on gender *alone* would imply an illegitimate crossing from the sphere of attributes to the sphere of voluntary redundancy benefits. See the discussion on *Roberts,* immediately below.

while a woman seven years below *her* national pensionable age would not). A Walzerian take on the case, on the other hand, would start with the distributive community, and its shared understanding of an early pension. What does "early" mean? Does it mean 55, irrespective of gender (again, the "biological-age understanding")? Or does it mean five years prior to the employee's national pensionable age? If the latter, could the "extra" five years of eligibility enjoyed by men at the time of Ms Roberts' action (namely, the period from age 55 to age 60) represent a sly advantage, making masculinity a positive dominant?[116] It is at least possible, then, taking as read the Standard Contingent Reply, that Tate & Lyle's pension scheme sanctions a distribution flawed by dint of a boundary breach. If this is the final conclusion, then it would obviously conflict with the Court's actual decision, which was the Tate & Lyle had *not* violated the principal of equal treatment.[117]

Barber is almost a mirror image of *Roberts*, in that instead of the current system being based on the biological-age understanding, and the complainant calling for the run-up rationale, here the current system was based on the run-up rationale, but with Mr Barber calling for the biological-age understanding to be used in its place. It would be up to the distributive community to decide what it understood by an immediate pension, and indeed what "immediate" should mean in this context. If the meaning is to provide protection for those workers who are made redundant, then the availability of the benefit in the run-up to the attainment of the national pensionable age, in other words, in the period during which redundancy is most likely to take effect, would seem, as in *Burton*, to be critical.[118] Alternatively, the community might call for the immediate pension to be available to everyone at 55, regardless of gender, and come to the conclusion that the "extra" five years of eligibility which the existing approach

[116] For a discussion of how an attribute can be a positive, or negative, dominant, see supra, section 3.3.

[117] It is important to note, though, that, on this analysis, even after the flaw in the distribution was resolved (ie early pensions were granted to men at sixty, and women at fifty five), this would still not help Ms Roberts. An alternative approach would be to level down rather than up, so that *ten* years prior to the employee's national pensionable age was set as the threshold for an early pension. That way, women would enjoy the "extra" five years too, and Ms Roberts would qualify for a pension at 53. As usual, this would be up to the distributive community.

[118] Furthermore, it is not as though a male worker made redundant before the beginning of his run-up period (like Mr Barber) would be left completely without help. They would still have access to the "deferred" pension in the meantime.

bestows on women (namely, the period from age 50 to age 55[119]) was a secret benefit, turning the possession of female gender into a positive dominant. The Standard Contingent Reply prevails as usual, but the stronger of the two positions would seem to be the first one. If the distributive community assents, then the status quo would be vindicated and complex equality upheld. This would once again be at odds with the Court's finding of *discrimination* on the part of Guardian Royal Exchange. It is worth noting how the Walzerian test produces *consistency* as between *Barber* and *Burton* (no breach of complex equality in either), where using the Aristotelian test in those cases led the Court to give two conflicting judgments (discrimination in *Barber*, no discrimination in *Burton*), even though the pension schemes utilized by the two employers were similar (although the one in *Barber* was contracted-out while the one in *Burton* was not), and the complaints made by the two (male) plaintiffs were almost identical. The "problematic" nature of the *Burton* judgment "in view of the more recent case law on pensions" is thus overcome.[120]

Finally, there is *Birds Eye*. In this case, the starting point of a Walzerian examination would be for the distributive community to decide upon its shared understanding of a bridging pension. It would probably conclude that this was a means of providing relief to those workers who had taken early retirement on grounds of ill health, until the maturing of their State pension (at age 60 for a woman, and at age 65 for a man). It would therefore probably further conclude that the fact that the date on which the bridging pension began to be reduced corresponded to the date on which the State pension became payable was at the very least logical. A female worker's receiving a smaller bridging pension than a male worker between the ages of 60 and 65 would thus seem to be in keeping with the (likely) shared meaning of the distribuend in question. Taking as read the Standard Contingent Reply, it appears plausible that a Walzerian examination of this case would disclose no breach of complex equality; this would be the same result as that reached by the Court, which found no discrimination in the behaviour of Birds Eye Walls.[121]

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[119] These five years are not really "extra" as the ones in *Roberts* were (see previous paragraph). They may occur *earlier* in the female worker's life, but the aggregate number of qualifying years remains ten for both sexes.

[120] Quotations from I Heide, "Sex equality and social security: selected rulings of the European Court of Justice" 2004 International Labour Review v.143, n. 4, 299, 327.

[121] Likewise a Walzerian analysis of Case C-19/02 *Hlozek*, supra n 111, would most likely result in the distributive community's declaring that the meaning of a bridging allowance was to provide

However, it must also be remembered that the Court was happy to declare that women and men, that is, *all* women and *all* men, were not in "identical situations"[122], in other words, were not *alike*, "between the ages of 60 and 65"[123]. As discussed above, this reasoning ignores the possibility that a female claimant, like in fact Mrs Roberts, might not be in receipt of a State pension between those ages. The Aristotelian sledgehammer effect is thus seen once again. Aristotelian logic, as clearly invoked by the Court at paragraph 17 of its judgment, is unable to discern the subtle differences that may arise from one case to another; it is incapable of reaching a conclusion of "like in some cases, unlike in others". A Walzerian approach, it is submitted, would have picked up on the difficulty here. As ventured in the previous paragraph, the distributive community might well decide that, to it, a bridging pension means "a means of providing relief to those workers who have taken early retirement on grounds of ill health, until the maturing of their State pension". But it follows that, if there is no State pension to mature, then the bridging pension must continue providing relief indefinitely. And if that is what a bridging pension means, then distributing it in any other way violates complex equality. The fact of not being in possession of a matured State pension is the attribute which the complex egalitarian (assuming the meaning above is the correct one) would see as legitimate, that is, as legitimately able to swing the distribution. *That* is the attribute that forms part of the meaning, not the fact of being female or the fact of being male. If a future female claimant, then, without a matured State pension at 60, were to lay claim to her bridging pension after her sixtieth birthday, she would not be denied it, as she would still be able to show the requisite badge of entitlement.

3.6. The question of part-time and full-time work

a financial bridge between the termination of the worker's employment and the receipt of the State pension (again, the run-up rationale). Thus the difference, as between the sexes, of the age at which the worker was entitled to the bridging allowance made perfect sense, as long as the State pensionable ages themselves were different. Of course, for the *latter* to be altered, being as they are a separate distribution, would be a job for a separate, and presumably much larger, forum.

[122] Case C-132/92 *Birds Eye Walls*, supra n 95, para. 17.

[123] Ibid., para. 20.

3.6.1. Case-law

A good starting point for this section is the case of *Bilka*[124], which neatly straddles the dividing line between cases concerning pensions, on the one hand, and cases concerning part-time work and full-time work, on the other.

Mrs Weber von Hertz had worked for Bilka, the German department store, for fifteen years, that is, from 1961 until 1976. Although for the first eleven years she had worked full-time, from October 1972 onwards she worked part-time. Bilka declared that, in order to obtain a pension under its occupational pension scheme, an employee must have worked full-time for at least fifteen years (over a total period of twenty years). Mrs Weber von Hertz alleged a breach of EC law on the grounds that women workers "were more likely than their male colleagues to take part-time work so as to be able to care for their family and children"[125].

The ECJ considers the main issue, which is of course discrimination. Although the Court does not use the term, it is *indirect discrimination* which is at stake here; Bilka is making receipt of the pension conditional upon a requirement (fifteen years' full-time work) *applied equally to all*, but with which *a considerably smaller proportion* of women than men (it is argued) can comply. It will be seen that the exact wording of the second limb of the test for indirect discrimination varies in the ECJ's case-law[126]. In *Bilka* itself, the Court settles on the phrase "much lower proportion":

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[124] Case 170/84 *Bilka - Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607.
[125] Ibid., para. 6.
[126] Since 1997, there has been a legislative definition, at Article 2 of the Directive on Indirect Discrimination and Burden of Proof (Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex [1998] OJ L 14/6). This reads: "[I]ndirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex". This definition was replaced in the New Equal Treatment Directive by a second one: "[I]ndirect discrimination [shall exist] where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary". The New Equal Treatment Directive has since been overtaken by the Recast Directive, where the definition of indirect discrimination can be found at Article 2(1)(b); it is identical to the definition in the New Equal Treatment Directive.

> *"If, therefore, it should be found that a much lower proportion of women than of men work full time, the exclusion of part-time workers from the occupational pension scheme would be contrary to Article 119 of the Treaty where [...] that measure could not be explained by factors which exclude any discrimination on grounds of sex."*[127]

As to this "explanation", known as an "objective justification", Bilka argues that the exclusion of the part-time workers from the scheme "is intended solely to discourage part-time work, since in general part-time workers refuse to work in the late afternoon and on Saturdays"[128]; the company was thus trying to make full-time work "more attractive"[129]. The ECJ gives little guidance on objective justifications, however, and their assessment remains a job for the national court:

> *"If the national court finds that the measures chosen by Bilka correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end, the fact that the measures affect a far greater number of women than men is not sufficient to show that they constitute an infringement of Article 119."*[130]

Finally, in an intrepid move, Mrs Weber von Hertz called for "periods during which workers have had to meet family responsibilities" to be *regarded as* "periods of full-time work"[131]. However, the Court dismissed this with the now-famous remark:

> *"Article 119 does not have the effect of requiring an employer to organize its occupational pension scheme in such a manner as to take into account the particular difficulties faced by persons with family responsibilities..."*[132]

Bilka built on the slightly earlier case of *Jenkins*[133], where part-time employees (all but one of whom were female) were paid at a lower hourly rate than full-time employees, although both types of employee were doing the same work. The Court saw no problem with an employer's full-time rate being higher than its part-time rate, as long as there was no distinction between men and women

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[127] Case 170/84 *Bilka,* supra n 124, para. 29. Article 119 EC subsequently became Article 141 EC, and now Article 157 TFEU.
[128] Ibid., para. 33.
[129] Ibid.
[130] Ibid., para. 36.
[131] Ibid., para. 39.
[132] Ibid., para. 43.
[133] Case 96/80 *JP Jenkins v Kingsgate (Clothing Productions) Ltd* [1981] ECR 911.

(that is, as long as male and female part-timers were treated equally, and male and female full-timers were treated equally). However, if it were established that a "considerably smaller percentage"[134] of women than men performed "the minimum number of weekly working hours required in order to be able to claim the full-time hourly rate"[135], then there would be a breach of (what is now) Article 157 TFEU, in the absence of an explanation *not based on sex*. It was for the national court to decide, regard being had, inter alia, to "the employer's intention"[136], whether or not a difference based on weekly working hours was "in reality"[137] discrimination based on the sex of the worker.[138]

In *Stadt Lengerich v Helmig*[139], six (part-time) female employees sued their employers on the ground that part-time employees were not receiving the same rate of pay *for overtime* as full-time employees. In other words, a full-time employee, working in excess of the "ordinary working week of full-time workers"[140] (in this case, 38.5 hours), would receive payment at between 15 and 25% above the hourly rate. Meanwhile, a part-time employee, working in excess of *their* contractual working hours (which varied), would receive payment at the *normal* rate. (In the event that the part-time employee continued to work beyond the 38.5 hour threshold, *then* they would become entitled to the higher rate.) The plaintiffs alleged that this state of affairs breached Article 119 EC[141] and the Equal Pay Directive.

Advocate General Darmon dealt with the issue swiftly. Part-time employees were not treated differently, per se, from full-time employees. Both received

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[134] Ibid., para. 13.
[135] Ibid.
[136] Ibid., para. 14.
[137] Ibid.
[138] Lester has called the *Jenkins* judgment "equivocal" and "sibylline", particularly owing to this reference to the employer's intention, which appeared to shield *unintentional* indirect discrimination from censure. He explains that the Court's judgment was not "able to be used" by the Employment Appeal Tribunal (when the case returned to the UK), so that "no-one was any the wiser": A Lester, "The Uncertain Trumpet – References to the Court of Justice from the United Kingdom: Equal Pay and Equal Treatment without Sex Discrimination" in Schemers (ed), *Article 177 EEC: Experiences and Problems* (North Holland, 1987) 164, 177-183.
[139] Joined Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93 *Stadt Lengerich v Angelika Helmig and Waltraud Schmidt v Deutsche Angestellten-Krankenkasse and Elke Herzog v Arbeiter-Samariter-Bund Landverband Hamburg eV and Dagmar Lange v Bundesknappschaft Bochum and Angelika Kussfeld v Firma Detlef Bogdol GmbH and Ursula Ludewig v Kreis Segeberg* [1994] ECR I-5727.
[140] Phrase used by Darmon AG. Ibid., at 5729 (Para. 3 of the Opinion).
[141] As it then was – subsequently Article 141 EC, and now Article 157 TFEU.

overtime supplements when the weekly working time fixed by collective agreement *for full-time workers* was exceeded. Far from remedying an inequality, to grant part-time employees overtime supplements when *their* weekly working time was exceeded would actually "give rise to a real inequality"[142], as, for the same number of hours worked, some would get the overtime supplements while others would not. Ex Article 119 EC was, as things stood, not breached. The ECJ agreed with this position:

> *"In the circumstances considered in these proceedings, part-time employees do receive the same overall pay as full-time employees for the same number of hours worked."*[143]

There was thus no discrimination in breach of ex Article 119 EC, and no violation of Article 1 of the Equal Pay Directive.

In February 1996 came the case of *Kuratorium für Dialyse und Nierentransplantation v Lewark*[144]. Ms Lewark was employed for 30.8 hours a week in the defendant's "Care Unit", where she was one of eleven part-time workers (ten women and one man). She was also the only part-time worker on the Local Staff Council. In November 1990, with the defendant's consent, she attended a full-time training course in order to obtain the knowledge that was necessary for performing her functions on the Staff Council. The training course on 13 November 1990 lasted 7.5 hours. Ms Lewark would not normally have worked that day. The defendant paid her her normal salary for the week (30.8 hours), but failed to recompense her for the time spent on the training course. Since a full-time worker would have been so recompensed, Ms Lewark considered that there had been a breach of Article 119 EC[145] and the Equal Pay Directive.

As regards whether there was a difference in treatment between those working part-time and those working full-time[146], the Court concluded that there was

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[142] Ibid., at 5733 (Para. 29 of the Opinion).
[143] Ibid., para. 27.
[144] Case C-457/93 *Kuratorium für Dialyse und Nierentransplantation e.V. v Johanna Lewark* [1996] ECR I-243.
[145] As it then was – subsequently Article 141 EC, and now Article 157 TFEU.
[146] Note that the Court's earlier, more lenient approach to such difference in treatment (see, for example, Case 96/80 *Jenkins*, supra n 133, para. 11) seemed to have now slightly hardened (see, for example, Joined Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93 *Helmig*, supra n 139, para. 26).

indeed such a difference in treatment; this was in fact "indisputable"[147]. The Court then stated that, if it were the case that "a much lower proportion"[148] of women than men worked full-time, the exclusion of part-time workers from the benefit in question (that is, compensation for the time spent on the training course) *would* be contrary to ex Article 119 EC, in the absence of an explanation not founded on sex. After examining the relevant statistics, the Court concluded that, in this particular case, there was (in principle) "indirect discrimination"[149]. It of course remained open to Germany to show that the measure taken by the defendant reflected a legitimate aim of social policy, was appropriate to achieve that aim and was necessary in order to do so. It will be seen that this is the same three-stage test as was proposed by the Court in *Bilka*[150]. As usual, it was up to the national court to assess whether this test was satisfied.

A month later, the Court reached an almost identical conclusion in the case of *Freers*[151].

In the 2004 case of *Wippel v Peek & Cloppenburg*[152], Ms Wippel was employed by the Austrian company Peek & Cloppenburg pursuant to a system known as "work on demand". She had no fixed working hours, and the duration and "positioning" of her working time was determined by agreement between the parties in each individual case. Specifically, the sales manager would ask her to work certain hours in a given week, and Ms Wippel could either accept or decline, without any need to give reasons. Importantly, she was not guaranteed any fixed income. Ms Wippel complained that the absence in her contract of an agreement as to working hours and the organizing of working time amounted to discrimination on the grounds of sex.

The Austrian law on Working Time[153] provided that the "positioning" of normal working time was to be by agreement, as were any changes thereto. However, notwithstanding this, the "positioning" of normal working time *could* be changed unilaterally by the employer, but only if, inter alia, there was a justification and

[147] Case C-457/93 *Lewark*, supra n 144, para. 26.
[148] Ibid., para. 28.
[149] Ibid., para. 30.
[150] Case 170/84 *Bilka*, supra n 124, para. 36, quoted above (see text accompanying n 130).
[151] Case C-278/93 *Edith Freers and Hannelore Speckmann v Deutsche Bundespost* [1996] ECR I-1165.
[152] Case C-313/02 *Nicole Wippel v Peek & Cloppenburg GmbH & Co. KG.* [2004] ECR I-9483.
[153] Arbeitszeitgesetz.

two weeks' notice was given to the worker. A later article of the same law applied these principles to part-time work too.

Advocate General Kokott started by considering the new Part Time Workers Directive[154]. The latter, following the increasingly tough language in the case-law, had introduced a prohibition on discrimination against part-time workers. However, the Advocate General concluded that there was no such discrimination in the legislation in this case (the Austrian law on Working Time treated full-time workers and part-time workers in the same way). Nor, according to the Advocate General, was there discrimination on the grounds of sex in the legislation in this case. Although the law made provision, in respect of full-time workers, for normal working time of 40 hours a week and 8 hours a day, no specific provision on maximum working time existed for part-time workers. The absence of such a provision had a greater impact on women than men. However, in stark contrast to the referring court, which saw this as an instance of "like treated unlike", the Advocate General decided that full-timers and part-timers were not comparable "in this specific context"[155].

Turning to the contract of employment, Kokott AG again found no discrimination against those working part-time. If anything, a "work on demand" contract which made no provision for (previously agreed) fixed working time would be "beneficial" to "employees who are only able... to work irregular hours and in varying amounts"[156]. With regards to sex discrimination, if *all* of those with fixed working hours (part-time *or* full-time) were compared with those employed on demand, the difference in percentage of female workers was so small as to be insignificant. There could be no discrimination if the numbers of women were the same on both sides of the comparison (those allotted a fixed working time, and those not).[157]

The Court agreed with the Advocate General in all of her conclusions. Of particular interest is that, as regards possible sex discrimination in the

[154] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex : Framework agreement on part-time work [1998] OJ L 14/9.
[155] Case C-313/02 *Wippel*, supra n 152, at 9512 (Para. 93 of the Opinion).
[156] Ibid., at 9515 (Para. 106 of the Opinion).
[157] Of course, if all those working full-time were compared with all those working part-time, the difference in percentage of female workers *was* significant. However, neither the Advocate General nor the Court were minded to run this comparison.

employment contract, the Court declared that since no full-time worker at Peek & Cloppenburg had a contract like Ms Wippel's, she effectively had no comparator. Without a comparison, there could not be a finding of less favourable treatment[158]. The Court is here conspicuously moving away from the doctrine of noncomparative discrimination which it had championed in the pregnancy cases[159]. Similarly, turning to the Equal Treatment Directive, the Court contemplated the same comparison as the Advocate General, namely, to compare *all* of those with fixed working hours (part-time *or* full-time) with those employed on demand. However, it went further than the Advocate General by abandoning the comparison altogether. Because the second group could accept or refuse work at will, while the first group could not, the two groups were simply "not analogous"[160]. If they were unlike, they could of course be *treated* unlike.

3.6.2. Preliminary Analysis

In *Helmig*, Advocate General Darmon mentions (and the Court does not disagree) that one rationale for the granting of overtime payments is the need for employers to be dissuaded from working their employees long hours. This in turn is because, according to the Advocate General, workers need leisure-time and recuperation from fatigue. Therefore, as well as penalizing the employer, the overtime payment in some ways attempts to (partially) compensate the employee for their lost leisure and rest. By declaring that full-time employees (mostly male) and part-time employees (mostly female) were treated alike as regards overtime, the Court implied that a woman who (for the sake of example) works part-time while raising a family loses neither leisure nor rest if she is required to work more than her usual shift (but less than a "full-time" shift). But this is erroneous if, as Mrs Weber von Hertz argued in *Bilka*, familial responsibility is regarded as work too.

The point made in the previous paragraph raises a myriad of issues, many if not all beyond the scope of this dissertation. They cannot be done justice in a short

[158] Case C-313/02 *Wippel*, supra n 152, at para. 62.
[159] To this it could conceivably be counter argued that the Court was merely constrained by the wording at Clause 4(1) of the Framework Agreement on part-time work, annexed to the Part Time Workers Directive.
[160] Case C-313/02 *Wippel*, supra n 152, at para. 64.

space. Only a cursory examination of these issues will therefore be attempted here; the writers cited should be consulted for a full analysis of the arguments.

At the heart of the matter is what the Court itself called the "double aim" of Article 119 EC (later Article 141 EC, and now Article 157 TFEU)[161], namely, its economic aim and its social aim. As Barnard excellently explains, the formal, like-for-like test lends itself perfectly to the economic role ("creating a level playing field of competition"), but much less well to the social role[162]. The economic sphere is centred on the market, and the market is historically predicated on a "male breadwinner" model. Comparisons were thus traditionally to a "male norm"[163], and no allowance was made for women's onerous caring duties (for example, arguably, by Stadt Lengerich and the other employers, endorsed by the Court, in *Helmig*).[164]

That said, the Court's record on the social dimension of Article 119 EC (later Article 141 EC, and now Article 157 TFEU) has not been entirely negative. Many of the successes can indeed be found in the case-law on full-time and part-time work, and particularly the use of the doctrine of indirect discrimination. This doctrine, some argue, allows for consideration of groups, as opposed to individuals; a measure is impugned if it impacts negatively on a whole class of

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[161] Case 43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* (no. 2) [1976] ECR 455, para. 8 and 12.

[162] Catherine Barnard, "The Economic Objectives of Article 119" in TK Hervey and D O'Keeffe (eds), *Sex equality law in the European Union* (Wiley, Chichester 1996) 329.

[163] The most celebrated writer on this particular aspect of the debate is Catherine MacKinnon: "As male is the implicit reference for human, maleness will be the measure of equality in sex discrimination law… If male power is systemic, it *is* the regime." See C MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence" (1983) 8 Signs 635, 644-5 (MacKinnon's emphasis). See also C MacKinnon, "Reflections on Sex Equality Under the Law" (1990-91) 100 Yale Law Journal 1281.

[164] On the subject of women's caring role, Everson has written, "it is the inability of [the European right of sexual equality]... to take caring obligations into account, which has failed European women as a whole". See M Everson, "Women and Citizenship of the European Union" in TK Hervey and D O'Keeffe (eds), *Sex equality law in the European Union* (Wiley, Chichester 1996) 209. The Court's approach in *Helmig* has been described as "problematic": Hervey and Shaw, supra n 6, 54. Ellis said that the judgment left the law in an "unsatisfactory state": Evelyn Ellis, "Recent developments in European Community sex equality law" Common Market Law Review, Vol. 35, No. 2, April 1998, 379, 383. Wentholt commented that it "expresse[d] a male point of view": K Wentholt, "Formal and Substantive Equal Treatment: the Limitations and the Potential of the Legal Concept of Equality" in T Loenen and PR Rodrigues (eds), *Non-discrimination law: comparative perspectives* (Kluwer Law International, The Hague 1999) 63. Costello and Davies called it "dubious": C Costello and G Davies, "The case law of the Court of Justice in the field of sex equality since 2000" Common Market Law Review 2006, v. 43, n. 6, December, 1567, 1591.

comparators, not just one[165]. Others, however, refuse to see indirect discrimination as a victory for substantive equality. Hervey, for example, believes that the ECJ's use of indirect discrimination is still essentially market-driven, and warns that the doctrine has "significant limitations"[166].

Finally, on the question of part-time and full-time work, there is something worrying about the *Wippel* judgment, in that the whole case turns on the comparison between workers on demand and workers with fixed hours. Can the very fact that workers on demand work on demand support, in and of itself, an *a priori* refusal to compare? This is reminiscent of Westen's oft-quoted complaint about the circularity of equality: "people who by a rule should be treated alike should by the rule be treated alike"[167]. The comparison is over before it starts, because the fact that two things have *already* been treated differently (Column 2 at Appendix I), specifically, in this case, one worker has been given fixed hours and another has not, *predetermines* whether or not they are to be regarded as "like" (Column 1 at Appendix I). On Westen's analysis, while one may pretend that the distributing of goods takes place after the allocating of attributes, in actual fact the distribution has already taken place, when the attributes were allocated. The same "standard or rule"[168] is applied to both events, and, having been applied the first time, it cannot help but be applied the second time; treatment thus folds into likeness.[169] The consequence of this from a judicial point of view is that, as McColgan puts it, the differences between comparators are "reducible to the very ground on the basis of which the claimant sought to challenge the discrimination".[170]

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[165] Mancini and O'Leary, supra n 73, 342-3; Lisa Waddington, "The development of a new generation of sex equality directives" Maastricht Journal of European and Comparative Law 2004, v. 11, n. 1, 3, 6.

[166] TK Hervey, "Thirty Years of EU Sex Equality Law: Looking Backwards, Looking Forwards" Maastricht Journal of European and Comparative Law 2005, v. 12, n. 4, 307, 311. The same author, writing with Helen Fenwick, went as far as to say that, when faced with a conflict between equality for women and the interests of the market, the Court would "safeguard the market": Fenwick and Hervey, supra n 35, at 469.

[167] P Westen, "The Empty Idea of Equality" (1982) 95 Harvard Law Review 537, 547.

[168] Ibid., 545.

[169] As Numhauser-Henning puts it, referring to *Wippel*, "[the] problem consists of the fact that what is forbidden by the non-discrimination provision – differential treatment as regards employment conditions – is at the same time part of what constitutes the groups that are to be compared. Different employment conditions pertaining to the mode of employment are a *sine qua non*": Numhauser-Henning, "EU sex equality law post-Amsterdam" in Meenan (ed), *Equality Law in an Enlarged European Union* (CUP, Cambridge 2007) 155-6.

[170] Supra n 3, 670, referring to the approach of Lord Hoffman in the English case of *Carson*: *R. (on the application of Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37; [2006]

3.6.3. A Walzerian analysis

Refracting the same cases through the prism of complex equality shows, firstly, how complex equality facilitates a more robust scrutiny of (to use the Aristotelian nomenclature) "objective justifications". It also demonstrates how Walzer's theory produces more predictable results (more often than not different from those reached by the Court), and allows for a more compassionate handling of cases like *Helmig*.

In *Bilka*, for example, the *fons et origo* of the enquiry would be the *meaning* of a pension under an occupational pension scheme, as shared by the members of the relevant distributive community. Is such a pension to reward a commitment to full-time work? Or is it to aid an ex-employee in their old age? If the latter, then making the distribution conditional on the completion of 15 years' full-time work would seem inappropriate, or, put in Walzerian terms, the *fundamentum distributionis* would seem to be out of line with the meaning of the good being distributed.[171] Those who had completed 15 years of full-time work (of whom there would necessarily be more men than women) would now hold a badge of honour, garnered via an unconnected achievement in a different sphere, which would give them exclusive access to the sphere in issue. Bilka's scheme thus provides good examples of both a flawed distribution and a boundary breach.

The Court left open the possibility that Bilka's behaviour in disenfranchising part-time workers could be justified, the only justification put forward by Bilka being the desire to discourage part-timers and to make full-time work more appealing. The ECJ, then, while not expressly endorsing this justification (a job which it leaves to the national court), at least *entertains* it as a possibility. It will often be seen in this case-study how the job of the judge (European or national) in assessing a proposed objective justification is *similar* to the job of the

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1 A.C. 173. Costello and Davies comment that the Court's handling of the comparability issue in *Wippel* was "regrettable": supra n 164, 1594.

[171] It would be different if the 15-year stipulation was connected *financially* to the pension, that is, if 15 years of full-time employment was somehow the minimum amount of salary-generating work needed to pay for it (via contributions deducted at source). However, it is clear that building up a sufficient quantity of contributions is not the issue here. Bilka stated before the Court that the stipulation was "*solely* to discourage part-time work": Case 170/84 *Bilka*, supra n 124, para 33 (emphasis added).

"gatekeepers" of any given sphere in trying to decide whether a badge presented by a would-be distributee may be legitimately brought in, or must be left "at the door". The same sort of issues, whether justifying a discrimination or attempting to tie a badge to the business of a sphere, tend to crop up. However, it is not just the same process described in a different way, and *Bilka* is a good illustration of that. At the objective justification stage of the Aristotelian test, almost anything may be pleaded as a possible rationale for discrimination by a distributor[172]; the justification put forward needs only to be remotely of interest or importance to him or her.[173] The "gatekeeper" stage of any proposed transaction under complex equality, meanwhile, is a much stricter affair; holders of badges without a proven connection to the "host" sphere will be refused entry, unless they are prepared to put the badge aside. Thus, under a Walzerian analysis, Bilka's sole suggested defence could be rejected straight away, without the need in this instance to wait for the national judge; it simply has nothing to do with the distribution of pensions. That is not to say that it may not be a valid or worthy goal, just that the wrong means were chosen to accomplish it. In Walzerian terms, Bilka pursued its objective in the *wrong sphere*. This is reminiscent of a famous line of TS Eliot's:

> *"The last temptation is the greatest treason: to do the right deed for the wrong reason."*[174]

In *Bilka*, of course, it was the "reason" which was – arguably[175] – right, and the "deed" which was wrong.

Looking at the worst case scenario, and assuming that Bilka's defence is accepted by the referring court, the overall result would be to exonerate the store of discrimination altogether. The Walzerian analysis, meanwhile, culminates in the finding of a clear boundary breach on the part of Bilka, that is,

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[172] As long as it does not involve a suspect ground. Economic rationales, in certain types of internal market cases, are also excluded.

[173] The proportionality test – and particularly the appropriateness branch thereof – is supposed to disqualify any that are *too* remote.

[174] TS Eliot, *Murder in the Cathedral* (Faber and Faber, 1935) 47.

[175] The point being made here is not that the department store was correct in its policy of discouraging part-time workers – a policy which would obviously have had a disastrous impact on women employees – merely that *if* the discouragement of part-timers was the result that Bilka wanted to achieve, it should have opted for a more appropriate method by which to achieve it. To return to the education example, a schoolteacher may give one student an A grade and one student a C grade on the grounds of the two students' relative intelligence, but not on the grounds that the second was caught smoking while the first was not – even though preventing minors from smoking is, in and of itself, a perfectly laudable aim.

a violation of complex equality. This same pattern (Walzerian analysis revealing infraction of complex equality, while no infraction of equality principle found by ECJ at all) is repeated several times.

Jenkins does not require a lengthy analysis here, as, from the legal point of view, it is very similar to *Bilka*. Kingsgate Ltd (the defendant company) may have had a legitimate wish to disincentivize part-time workers, but it should not have used the *hourly rate* as a means by which to achieve this. To do so distorts the true meaning[176] of the hourly rate. The distributive community[177] would almost certainly hold that the hourly rate should represent recompense, or consideration, for one hour's work. It is not a tool by which to penalize those who have chosen to work part-time, thus turning their choice into a negative dominant[178]. That fight had to be fought (if at all) in a different arena.

In *Helmig*, Stadt Lengerich and the other employers denied their part-time workers overtime supplements when they worked beyond their ordinary working week, but granted the same supplements to full-time workers who had worked beyond *their* ordinary working week. This implied that a part-time worker (almost certainly a woman) who worked beyond her ordinary working week had not lost any leisure-time or recuperation from fatigue (a loss normally requiring compensation), and that the time between the end of her ordinary working week and the end of a full-time worker's ordinary working week was effectively "spare" and at the disposal of the employer at no extra cost. There is little doubt that this represents a massive boundary breach. By belittling, if not abnegating, a part-time female employee's caring duties by effectively declaring that only after 38.5 hours *in the workplace* can anyone be regarded as fatigued, Stadt Lengerich and the other employers contribute to the perpetuation of abhorrent notions about the role of carers (for which read women) in today's society. If they belong anywhere (and it is a big "if" in the 21st century), notions of

[176] Taking the Standard Contingent Reply as read.

[177] There is no need to assume that this would only consist of the distributors (Kingsgate Ltd's management) and the distributees (Kingsgate Ltd's employees), and that it would therefore be intrinsically biased in favour of the full time (male) workers – who would represent the majority – and against the part time (female) workers. All interested parties are entitled to be present at a Forum, which might include Kingsgate's shareholders, its customers, and other members of the local community affected by its decisions. Furthermore, if the theory of mediated complexity were preferred to that of complex equality *stricto sensu*, then the decision would fall to the Bench, which would considerably reduce the risk of bias. See Chapter 8 below.

[178] For a discussion of how a choice can be a positive, or negative, dominant, see supra, section 3.3.

respective "roles" of family members – including emotional "roles" – belong within the sphere of kinship *only*. Their reiteration in the sphere of office (and others) is one of the worst boundary breaches that there is, and, as Armstrong points out, it cuts both ways – women are disadvantaged when those in other spheres assume female monopolization of caring work, and those assumptions (in a State's economic policy, say, or its law and order policy) feed back into the domestic sphere, thus preserving the status quo:

> *"[T]he theory of complex equality provides us with a particularly clear framework for analysing the political nature of the personal"*[179]

Boundary revision is urgently needed in this area, but the process is likely to be both lengthy and difficult.

In *Kuratorium* there is arguably an even bigger affront to part-time workers than there was in *Helmig*. The case turned once again on the temporal no-man's-land between the end of a part-time worker's ordinary working week and the end of a full-time worker's ordinary working week. This time, however, the distribuend was recompense for a training day. The full-time worker who attended the training day over and above his ordinary working week[180] would receive recompense. The part-time worker, such as Ms Lewark, on the other hand, who attended the training day over and above *her* ordinary working week, that is, on a day on which she would otherwise not have been working, received none. At least Ms Helmig received her normal hourly rate for the extra work undertaken; Ms Lewark did not even receive that.

Once again, it will fall to the distributive community to decide what it understands by a recompensed training day. It would be an odd community that did not answer this by simply saying that the recompense rewards the worker for having attended the training day, and compensates them for the lost time and energy; this meaning would seem to apply to any attendee, whoever they are, however long their ordinary working week is, and wherever the training day comes within it. A fundamentum distributionis which made receipt of the recompense conditional on the length of working week/ position of training day would thus offend against this meaning, in breach of complex equality. A (presumably

[179] C Armstrong, "Complex equality: Beyond equality and difference" 2002 Feminist Theory 3, 67, 80.

[180] Or, presumably, as part of it. This detail is not made clear in the judgment.

male) full-time worker could use their full-time status as a monopolizable badge of honour, which would come to act as a positive dominant. Since the Court this time found the employer's behaviour to be discriminatory, *Kuratorium* is one case in this area where an Aristotelian analysis and a Walzerian analysis would appear to coincide.

Finally, in *Wippel v Peek & Cloppenburg*, the task for the distributive community would be to arrive at a shared understanding of an agreement as to both working hours themselves, and the *organization* of working hours. Without putting words in the community's mouth, it might say that such an agreement provides certainty for a worker, enabling them to plan their time better and thus giving them greater stability. As in the previous case, this shared meaning would seem to apply to *any* type of worker. Thus, a distributive principle which differentiated between those who worked on demand and those who had fixed working hours would appear to be at odds with this meaning, flawing the distribution and violating complex equality. A second distribuend in this case, namely, a provision on maximum working time, would probably be understood in a similar way, which would also be universally applicable, making another partial distributive criterion similarly abusive of complex equality. The Walzerian outcome in *Wippel* diverges from the Court's, since the Court found no discrimination in this case *at all*. It may be seen that the Walzerian approach is preferable here. From the moment Ms Wippel makes her complaint[181], the outcome is infinitely more straightforward and predictable than it would be using the circular Aristotelian test as described above.

[181] The need for an actual complaint here is important, because, in the abstract, this case can seem perplexing. When the point is made in the text, for example, that the first of the shared meanings considered would seem to apply to *any* type of worker, a counter-argument might be that, while someone working on demand who wanted an agreement of this type would no doubt be grateful that they were included in the meaning of such an agreement, *why should they want an agreement like this in the first place?* Did they not choose work-on-demand to give themselves *flexibility* in the organization of their time? Why would they want their working week so structured in advance? The answers to these questions are hard. However, once a real complainant comes forward, it is no longer particularly relevant why they might want the agreement. The fact is that they *do* want it, and they allege that their being denied it is discriminatory. The focus of the lawyer's enquiry now, therefore, shifts from the reasons why a worker-on-demand would want their working hours organized, to whether the organization of their working hours, while no doubt contrary to custom or even inconvenient, is actually impossible (the *non-organization* of their working hours being a vital component of the job itself), or merely possible, but considered unnecessary. If the latter, the question to be answered next is whether the inequality which this consideration causes is reasonable (in the sense of *well-reasoned*). In other words, the reasons of the discriminator for discriminating are more important than the reasons of the victim of discrimination for wanting the discrimination to end.

3.7. Positive action

3.7.1. Case-law

Much of the following case-law turns on Article 2(4) of the (old) Equal Treatment Directive, and the question of whether or not this constitutes an exception to the general rule laid down in Article 2(1). Article 2(4) reads:

> *"This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1)."*

In the 1995 case of *Kalanke*[182], Mr Kalanke and a woman called Mrs Glissmann both applied for the post of Section Manager of Bremen's Parks Department. Since both candidates possessed the same qualifications, but since women were under-represented in the sector, the female candidate was given priority on the basis of Paragraph 4 of the Law on Equal Treatment of Men and Women in the Public Service of the Land of Bremen[183]. In proceedings brought by Mr Kalanke, the Court of Justice was asked if Article 2(4) of the Equal Treatment Directive *covered* Paragraph 4 of the German law, and, if not, whether Article 2(1) of said Directive required it to be disapplied.

Advocate General Tesauro considered that what was meant by "equal opportunities" in Article 2(4) was equality with respect to starting points, not points of arrival. However, Paragraph 4 of the German law was not designed to guarantee equality as regards starting points; it aimed to achieve equality as to result. Tesauro AG continued:

> *"This does not seem to me to fall within either the scope or the rationale of Article 2(4) of the directive."*[184]

The objective of Article 2(4) *was* substantive equality. Differentiated treatment *was* permissible under this article, but only the sort of differentiated treatment

[182] Case C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051.
[183] Landesgleichstellungsgesetz.
[184] Case C-450/93 *Kalanke*, supra n 182, at 3060 (Para. 13 of the Opinion).

needed to neutralize *existing difference*. Such treatment was discriminatory, but only in appearance; the existing difference *legitimized* the deviation from formal equality. The Advocate General went on:

> *"The rationale for the preferential treatment given to women lies in the general situation of disadvantage caused by past discrimination and the existing difficulties connected with playing a dual role."*[185]

Quota systems, in his opinion, were "irrelevant" to that end[186]. What was needed was "measures relating to the organization of work"[187] and "educational guidance and vocational training"[188]. Any positive action had to not only derive from an existing obstacle, but also had to be *temporary*, that is, it would cease once the obstacle was removed. In this case, the German law sought to cure *under-representation*. But:

> *"such a measure tends merely to rebalance the numbers of men and women, [...] it will not remove the obstacles which brought about that situation"*[189].

For these reasons, the Advocate General concluded that the German law was contrary to Article 2(1) of the Directive, and could not be excepted under Article 2(4).

The ECJ agreed that the German law was contrary to Article 2(1) of the Directive. As regards the derogation in Article 2(4), the Court declared:

> *"National rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive."*[190]

The German law was concerned, not with equality of opportunity, but with equality of *result*. It could not therefore be saved by Article 2(4).

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[185] Ibid., at 3063 (Para. 18 of the Opinion).
[186] Ibid.
[187] Ibid.
[188] Ibid. (Para. 19 of the Opinion).
[189] Ibid., at 3066 (Para. 24 of the Opinion).
[190] Ibid., para. 22.

Two years later, the Court had a second opportunity to consider the scope of Article 2(4). In *Marschall*[191], Mr Marschall and a woman candidate both applied for a teaching position. Since both the candidates were equally suitable, and since fewer women than men were employed in the relevant pay bracket, the female candidate was appointed to the position on the basis of the Law on Officials of the Land of North Rhine-Westphalia ("the Law on Officials")[192]. Mr Marschall brought an action, and the Administrative Court made a reference to the ECJ.

Advocate General Jacobs noted that the Law on Officials contained a proviso; where there was under-representation of women, women were to be given priority in the event of equal suitability "unless reasons specific to another candidate predominate". However, unlike a large number of the interveners, he did not see that this proviso was sufficient to merit diverging from the rule as laid down in *Kalanke*. The Law on Officials was discriminatory, and, notwithstanding the proviso, unlawful; it could not be saved by Article 2(4).

The Court, meanwhile, held that *Kalanke* had only outlawed the granting of *automatic* priority to women. The proviso (or "saving clause") altered the situation. Recalling Paragraph 22 of the *Kalanke* judgment[193], the Court stated that a guarantee of "absolute and unconditional priority" went beyond the remit of Article 2(4). But a national rule like the Law on Officials, containing as it did a saving clause, did *not* exceed the limits of the article. That said, of course, if a "reason... specific to another [male] candidate" were allowed to override a female candidate's priority, that reason could not itself be discriminatory *as against women*. This important condition became the second limb of the Operative Part of the Judgment.

In *Badeck*[194], forty six members of the Parliament of the Land of Hesse complained about the Hesse Equal Rights Law[195], which called for a large number of positive action initiatives to be put into practice in the public

[191] Case C-409/95 *Hellmut Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363.
[192] Beamtengesetz für das Land Nordrhein-Westfalen.
[193] Quoted above (see text accompanying n 190).
[194] Case C-158/97 *Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen* [2000] ECR I-1875.
[195] Hessisches Gesetz über die Gleichberechtigung von Frauen und Männern und zum Abbau von Diskriminierungen von Frauen in der öffentlichen Verwaltung.

administration. The State Constitutional Court of Hesse made a reference to the ECJ. Advocate General Saggio found all of the initiatives to be non-discriminatory, with the exception of a rule concerning appointment to collegiate bodies, wherein female candidates were to be granted appointments, irrespective of suitability, up to a quota of fifty percent. The Advocate General thought that, since this rule "allow[ed] no exceptions"[196], it exceeded the limits of Article 2(4) and could not therefore be saved. The Court meanwhile found *none* of the initiatives to be discriminatory; the rule concerning collegiate bodies was (according to it) "non-mandatory".[197]

Positive action was also touched upon in the unusual case of *Schnorbus*[198]. Here, a woman who had successfully passed the First State Examination in Law complained when she was passed over twice for admission to the practical legal training course. She was then forced to defer for some five months, pursuant to the Law on Legal Training[199], which permits the authorities to defer a person's appointment for up to twelve months. She alleged that the combined effect of the Law on Legal Training and its implementing regulation[200] was that those who had completed military service (who were necessarily all male) were able to take advantage of an exception to the deferral rule; they could plead "particular hardship" and gain automatic acceptance. The Administrative Court sought a reference.

Advocate General Jacobs' conclusion was that this was indirect discrimination, but that it was objectively justified. Those who had undertaken military service had had the commencement of their legal studies delayed by approximately one year; the German measures compensated for this delay. Because the measures were justified, there was no need to consider them in the light of Article 2(4). However, interestingly, the Advocate General did not rule out the possibility of measures like those at issue (giving preferential treatment to *men*) coming within the scope of Article 2(4): "the reference to existing inequalities

[196] Case C-158/97 *Badeck*, supra n 194, at 1899 (Para. 42 of the Opinion).
[197] Ibid., para. 65.
[198] Case C-79/99 *Julia Schnorbus v Land Hessen* [2000] ECR I-10997.
[199] Juristenausbildungsgesetz.
[200] Juristische Ausbildungsordnung.

which affect women's opportunities [in Article 2(4)] is merely an example"[201]. The Court agreed that this was indirect discrimination, and that it was justified by objective reasons.

Finally, one might consider *EFTA Surveillance Authority v Norway*[202]. Although this dissertation is concerned with the European Court of Justice, rather than the EFTA Court, this case is instructive in that it contains discussion (and ultimately endorsement) of the way in which the ECJ construes Article 2(4) of the Equal Treatment Directive. In it, the EFTA Surveillance Authority brought an action against Norway claiming that, by applying its legislation so as to reserve a certain number of academic positions exclusively for women, Norway had failed to fulfil its obligations under the EEA Agreement. The law in question was Article 30(3) of the Norwegian Act No. 22 relating to Universities and Colleges, the last sentence of which read:

> *"The Board can decide that a post shall be advertised as only open to members of the underrepresented sex."*[203]

Before the EFTA Court, Norway requested that a different approach be taken to that of the ECJ, under whose interpretation of the Equal Treatment Directive, "affirmative action measures are legally defined as derogations from the prohibition on discrimination"[204]. Rather, they should be viewed as "an intrinsic dimension" of the prohibition[205]. Norway admitted that its law permitted "automatic and unconditional preference" for women[206], but argued that this was what substantive equality demanded. The EFTA Court, however, would not diverge from the ECJ's approach. Article 2(4) of the Directive *was* a derogation, and absolute and unconditional priority (that is, the substituting of equality of representation for equality of opportunity) was forbidden. The last sentence of the Norwegian law at issue gave unconditional and automatic priority to women

[201] Case C-79/99 *Schnorbus*, supra n 198, at 11013 (Para. 53 of the Opinion). Note that Article 141(4), a result of the revision of the EC Treaty carried out at Amsterdam, was sex neutral, as is its successor in the Treaty on the Functioning of the European Union, Article 157(4) TFEU.
[202] Case E-1/02 *EFTA Surveillance Authority v The Kingdom of Norway* [2003] EFTA Court Reports 1.
[203] Ibid., para. 2.
[204] Ibid., para. 25.
[205] Ibid.
[206] Ibid., para. 26. And not just those women who were equally as qualified as, or better qualified than, men: see ibid., para. 45 (last sentence).

candidates, and such a measure could not fall within Article 2(4). Norway had therefore failed to fulfil its obligations.

3.7.2. Preliminary Analysis

The debate on positive action is very much a continuation of the one considered above in the context of the question of part-time and full-time work. The principal similarity between the two debates is the shift which positive action entails between individual rights and group rights. This time, however, the Court is noticeably more cautious. Positive action may involve the needs of a group (for example, female managers, female teachers or male lawyers who have undertaken military service) overriding the needs of given individuals (for example, Mr Kalanke, Mr Marschall or Ms Schnorbus). If such overriding does indeed take place (as in the cases of Mr Marschall and Ms Schnorbus), the individuals in question must satisfy themselves with the thought that their misfortune served a greater good. But this raises questions, in particular as regards the Kantian "Categorical Imperative". Are such people now being treated simply as a means? The "individual versus group" debate has generated a large volume of literature. In much of this, comparator-driven, "individualistic", formal equality is condemned, and group-oriented, substantive equality is often called for in its stead[207]. As far as this particular group of case-law is concerned, *Marschall* is regarded as the high-water mark, described by Hervey as,

> *"the closest the Court comes to recognising a substantive approach to equality"*[208].

Meanwhile, *Kalanke* has been described as "confused"[209], *Schnorbus* as "dismally confused"[210], and *EFTA* as "simplistic"[211].

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[207] Lacey, supra n 34; Catherine Barnard, "The Principle of Equality in the Community Context: *P, Grant*, *Kalanke* and *Marschall*: Four Uneasy Bedfellows?" Cambridge Law Journal, Vol. 57, No. 2, 1998, 352. For more on the weaknesses of "individualism", see Fredman, "Changing The Norm: Positive Duties In Equal Treatment Legislation" 12 MJ 4 (2005) 369, at 370 et seq.
[208] Hervey, supra n 166, 316.
[209] Hervey and Shaw, supra n 6, 59.
[210] Costello and Davies, supra n 164, 1598.
[211] Holtmaat and Tobler, supra n 4, 421.

As with the debate on full-time and part-time work, full justice cannot be done to the debate on positive action in this dissertation. There are compelling arguments on both sides, put forward in response to the complicated questions thrown up by the debate. These questions include whether there can ever be such a thing as a "debtor sex", owing "compensation" to a "creditor sex" for the historical wrongs done to the latter[212]. If so, for how long must this compensation be paid?[213] If indefinitely, is there not a risk that the once over-represented group will itself become under-represented in due course?[214] Furthermore, does such an arrangement only give rise to *benefits* for the creditor sex, or are there potential *detriments*, which should also be considered?[215]

Finally, returning to the question at the very beginning of this section, there is to this day phenomenal confusion over the issue of whether positive action is or is not an exception to the general rule against sex discrimination.[216] Holtmaat and

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[212] The phrase "creditor or debtor... sexes" can be found in Mancini and O'Leary, supra n 73, 345, referring to the concurring opinion of Scalia J in the US case of *Adarand v Peña* 515 U.S. 200 (1995). For more discussion of the "compensation arguments", and the possible replacement of "backward-looking" strategies with "forward-looking" ones, see M Tomei, "Discrimination and equality at work: A review of the concepts" International Labour Review, 2003, v. 142, n. 4, 401.

[213] It will be remembered that Tesauro AG in *Kalanke* insisted that positive action measures must be temporary. Also taking this position is Docksey: "The State would have to provide for monitoring the situation to ensure that single-sex recruitment is brought to an end when a better balance is achieved". See C Docksey, "The European Community and the promotion of equality" in C McCrudden (ed), *Women, Employment and European Equality Law* (Eclipse, London 1987) 17. In Allen's view, "time limiting affirmative action ensures that it is focused and more acceptable to those who cannot take the benefit of the action": Allen, "Article 13 EC, evolution and current contexts" in Meenan (ed), *Equality Law in an Enlarged European Union* (CUP, Cambridge 2007) 50.

[214] See Debra Franzese, "The Gender Curve: An Analysis of Colleges' Use of Affirmative Action Policies to Benefit Male Applicants" 56 Am. U. L. Rev. 719. Franzese describes a significant under-representation of men on US college campuses. It is not clear, though, whether this is the result of earlier positive action in favour of female students, or simply a natural increase in academic ambition on the part of women.

[215] One detriment could be that women who have been appointed to posts on the basis of a quota will be viewed as in some way inferior. As Evelyn Ellis puts it, positive discrimination "would be patronizing to women and would undermine their achievements": Ellis, supra n 164, 400. Docksey refers to the "possibility [for women] of being stigmatised as inferior candidates": supra n 213, 19. See also Tomei: "Preferential treatment... acts as a disincentive for members of the beneficiary groups to improve their skills [and] erodes their perceived competence in the eyes of society" (supra, n 212, 413).

[216] Wentholt accuses the Court of "undermin[ing] the effectiveness of affirmative action" by treating it as a derogation: Wentholt, supra n 164, 60. Docksey also regards it as a derogation: supra n 213, 17. Barnard calls for a "reconceptualis[ation]" of discrimination such that positive action would *no longer* be regarded as an exception: supra, n 207, 371-2. Masselot notes a conflict within the wording of the (later abandoned) Constitutional Treaty; Article II-83 presents positive action as an exception to gender equality, while Article III-214(4) presents positive

Tobler comment that it should in fact be regarded as "[sex equality's] other, positive side"[217]. The latter two writers, as well as Andrews[218] and of course the Norwegian delegation in *EFTA*, draw attention to the (arguably) preferable wording to be found in the UN Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW). However, as the EFTA Court (and Advocate General Jacobs in *Marschall*) pointed out, this Convention has for the moment no binding effect.

3.7.3. A Walzerian analysis

It is clear that, when it comes to positive action, it is better to take a broad approach to Walzer than a narrow one. Where such a complicated and pervasive social issue as gender inequality is at stake, it is necessary to contemplate the interplay of every sphere of justice with every other one, and the matter must be looked at in relation to the whole sphere and not just one particular element within it.[219]

In the context of the unequal treatment of women, Walzer entertains positive action (or affirmative action as it is known in the US), and furthermore he sees it

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action as *part of* gender equality: Annick Masselot, "The State of Gender Equality Law in the European Union" European Law Journal, Vol. 13, No. 2, March 2007, 152. Under the Lisbon Treaty, Article 141 EC remains – with one technical exception - untouched, although renumbered as Article 157; the new Article 157(4) is identical to (what would have been) Article III-214(4). Also, Article 6 TEU now gives binding legal effect to the Charter of Fundamental Rights of the European Union, Article 23 of which is identical to (what would have been) Article II-83. So in fact the conflict identified by Masselot has not gone away. Numhauser-Henning, too, observes that the Charter's wording is "more narrow" than that of the Treaty: supra n 169, 153.

[217] Supra, n 4, 414.

[218] Jill Andrews, "National and International Sources of Women's Right to Equal Employment Opportunities: Equality in Law Versus Equality in Fact" Northwestern Journal of International Law and Business, Vol. 14, No. 2, 1994, 413.

[219] If the narrow approach is insisted upon, then the results may be disappointing. This is because, on a more microscopic examination of the individual cases, disparities between (potential) shared understandings and the distributive criteria actually used do emerge. For example, there is no element of academic or managerial merit in Hesse's distribution of college appointments in *Badeck*, while, without wishing to pre-empt the particular distributive community at issue, a common understanding of such an appointment would be that the holder possessed some degree of aptitude either for teaching or for management (depending on the exact role in question). Thus recruitment strategies based entirely on positive action may, on the narrow reading, find themselves at odds with Walzer's theory, and it is accepted that, in these circumstances, positive discrimination is an area to which complex equality has less to offer. However, the reader is reminded of the important comment made at section 1.3. above, that the theory is proffered here only as a potential new tool to be added to the judicial tool-box, *not* as an all-encompassing theory operating to the exclusion of all others.

as a component of, rather than an exception to, complex equality. He uses here the argument mentioned above in the context of part time and full time work[220], that sex discrimination may *itself* be a boundary breach, as notions of gender "roles" within the family (part of what he calls the "structures of kinship") are reiterated in other distributive spheres, unjustly locking women into stereotypes that do not have the slightest connection to these other spheres. As he puts it,

> *"The real domination of women has less to do with their familial place than with their exclusion from all other places… [W]hat is most important right now is that the market, as it actually functions and as we understand its functioning, sets no internal bar to the participation of women. It is focused on the quality of goods and on the skill and energy of persons, not on kinship standing or sex."*[221]

And as he nicely sums it up in a later work,

> *"patriarchy and male dominance are […] examples of distributive simplicity."*[222]

Okin has probably gone the furthest of all commentators to develop this argument. While critical of Walzer's use of "shared understandings" as the basis for distribution, she praises his view that the various spheres of justice should be separated:

> *"Walzer's theoretical framework – separate spheres having to allow for different inequalities to exist side by side only insofar as a situation which he calls "dominance" is not created – has considerable force as a tool for social, and particularly for feminist, criticism."*[223]

She continues that the implications of the separate spheres criterion for justice

> *"suggest what many feminists have been arguing […]: the unequal distribution of rights, benefits, responsibilities, and powers within the family is closely related to inequalities in the many other spheres of social and political life. There is a cyclical process at work, reinforcing the dominance of men over women, from home to work to what is conventionally referred to as the "political" arena, and thence back home again."*[224]

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[220] See supra, text accompanying n 179.
[221] *Spheres of Justice*, supra n 9, 240-1.
[222] M Walzer, "Response" in D Miller and M Walzer (eds), *Pluralism, Justice, and Equality* (OUP, Oxford 1995) 290.
[223] SM Okin, *Justice, gender, and the family* (Basic Books, New York 1989) 112.
[224] Ibid., 113.

Women are still "designated and defined by their position within the family"[225], whereas:

> *"[s]ocial goods must be distributed in accordance with their own relevant reasons, not determined by women's familial roles."*[226]

If it were considered that, say, the Parks Department of Bremen, or even Bremen's entire local administration, was characterized by an overrepresentation of male workers, then it might be concluded that recruitment procedures over the years had been biased in favour of men and had sought to reiterate structures of kinship (male "provider"/ breadwinner, female carer) within the sphere of office. As this would be a violation of complex equality, it would then be appropriate to bring the violation to an end by ensuring, henceforth, a fifty-fifty gender divide within that Department/ administration. But if it were further considered that, given the engrained and institutional nature of the bias, preferential treatment should be accorded to women in the short term in order to bring about a fifty-fifty gender divide in the long term, then, logically, that too should be sanctioned by complex equality. On that analysis, the Court reached the wrong decisions in *Kalanke* and *EFTA*, although the right ones in *Marschall* and *Badeck*. The Walzerian result in *Schnorbus* would depend on how the Court read the preferential treatment accorded to male Bar candidates in that case. If such preferential treatment, which was intended to make up for a year lost to military service, in fact perpetuated structures of kinship within the sphere of office, either by reiterating supposed gender "roles"[227] in inappropriate fora, or simply by creating more male lawyers than female ones, then Ms Schnorbus was in the right in impugning it. If, on the other hand, it itself was a method of redressing an otherwise inevitable overrepresentation of women in the legal profession, then it could be condoned as a means of maintaining, not disrupting, the autonomy of the sphere in question.

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[225] Ibid.

[226] Ibid., 114. The theory which Okin goes on to develop, the "abolition of gender" (ibid., 116), is by her own admission one which "would certainly not be agreed upon by all as desirable" (ibid., 180). Nevertheless, this is, in her opinion, the logical conclusion to Walzer's theory, inasmuch as it applies to the gender issue. She thus goes further than the view expressed above that respective "roles" of family members (if any) should be restricted to the sphere of kinship, by asserting that they should be abolished *even from there*.

[227] The male as "fighter", for example.

4. Racial or ethnic origin, religion or belief, disability, age, and sexual orientation: New statuses, new status rights?

4.1. Introduction

The insertion of a new Article 13 into the EC Treaty, via the Treaty of Amsterdam in 1997, and the subsequent adoption of two major Directives[1], gave the ECJ significant new tools with which to investigate discrimination based on five additional grounds: racial or ethnic origin, religion or belief, age, sexual orientation, and disability. Since the coming into force of the Treaty of Lisbon on 1 December 2009, Article 13 EC has been replaced by Article 19 TFEU, which – with a few technical exceptions – is identical. It is of course wrong to suggest that these statuses were invented at Amsterdam; people were black and white, gay and straight, old and young, and so on, before 1997. It is just that Article 19 and its daughter Directives allowed differential treatment, grounded on such attributes, to be much more robustly objected to. Nevertheless, such treatment (as long as it fell within the ambit of the Treaty) could still have been objected to prior to the amendment by dint of the all-encompassing "general principle" of equality, the residual role of which, as will be seen, is a matter of some confusion.[2]

[1] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22 ("Directive 2000/43" or the "Race Equality Directive") and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 ("Directive 2000/78" or the "Framework Employment Directive").

[2] See Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981, and the comments on *Mangold* in Advocate General Sharpston's Opinion in Case C-427/06 *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [2008] ECR I-7245. And even before the adoption of the Directives, the general principle was, it seemed, of limited use. For example, it could not be used to admonish Member States which refused to treat same-sex relationships (or even registered partnerships) as equivalent to marriage (or opposite-sex relationships outside marriage): Case C-249/96 *Lisa Jacqueline Grant v South-West Trains Ltd.* [1998] ECR I-621, Joined cases C-122/99 P and C-125/99 P *D and Kingdom of Sweden v Council of the European Union* [2001] ECR I-4319.

4.2. Racial/ ethnic origin and religion/ belief

4.2.1. The ECJ's case-law

For the purposes of this dissertation, "racial or ethnic origin" and "religion or belief" will be dealt with together, although it is not at all asserted that they are the same thing. Religion, if anything, overlaps with race. As Brown points out:

> *"In most cases, discrimination on grounds of belonging to a minority religion will disproportionately affect people belonging to an ethnic minority; in other words, such religious discrimination will constitute indirect race discrimination."*[3]

Drawing a boundary between the two ideas can be "problematic"[4]. Lester has made an impassioned plea (albeit in the UK context) that race and religion must be treated separately, pointing to a number of significant differences between the two concepts (for example, a person's race may be visible, while his religion may be invisible)[5]. In the Jewish context, he goes on to explain, religious anti-Semitism and racial anti-Semitism are entirely distinct; they were prevalent at different times, and those affected by the second would not necessarily have been affected by the first[6].

The separateness of the two notions has certainly not been lost on the Community institutions, which chose to leave religion to sit alongside the other grounds, while giving race its own Directive, entailing noticeably greater protection: the Race Equality Directive[7]. The scope *rationae materiae* of the Race Equality Directive, which is set out in Chapter I thereof, embraces not only employment, but also social protection (including social security and healthcare), social advantages, education, and access to and supply of goods and services which are available to the public (including housing)[8]. Discrimination on grounds of racial or ethnic origin occurring in any of these four additional arenas is thus outlawed, while discrimination affecting any of the other "new statuses" would

[3] Christopher Brown, "The race directive: towards equality for "all" the peoples of Europe?" Yearbook of European Law 2001-2002, n. 21, p. 195-227, 204-5 (Brown's italics).
[4] M Bell, "EU anti-racism policy: the leader of the pack?" in Meenan (ed), *Equality Law in an Enlarged European Union* (CUP, Cambridge 2007) 187.
[5] A Lester and P Uccellari, "Extending the equality duty to religion, conscience and belief: proceed with caution" EHRLR 2008, 5, 567, 570.
[6] Ibid., 572.
[7] Directive 2000/43. Full citation at n 1, supra.
[8] Ibid., Article 3(1)(e)–(h).

not be[9]. Victims of race discrimination even receive greater protection than victims of gender discrimination, who admittedly are safeguarded in one of the additional arenas (goods and services), and part of another (social security), but not the remaining two.[10] This has led to talk of a "hierarchy" of grounds, with race at the top, followed by gender. Third place would be held jointly by religion, sexual orientation, disability and age[11], and last of all would be nationality[12]. However, writers seem to vacillate between lamenting the fact that the EU does not confer the same level of protection on all of the grounds[13], and accepting

[9] Cf. the Framework Employment Directive, Article 3(1).

[10] The Equal Treatment Directive (Directive 76/207, [1976] OJ L39/40) limited protection to employment (Articles 3, 4 and 5 of the original Directive, Article 3 only since amendment by Directive 2002/73, [2002] OJ L269/15). The position is the same under the Recast Directive, Directive 2006/54, [2006] OJ L204/23. Social security was dealt with in a separate instrument (Directive 79/7, [1979] OJ L6/24 – the Social Security Directive). In 2004, protection against sex discrimination was extended to cover goods and services, although, crucially, not education: Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37 – see Article 3(1) and Article 3(3). However, even within the arena of public goods and services, protection against race discrimination is more extensive than protection against sex discrimination, for example, sex may be taken into account in setting insurance premiums, but race may not. See ibid., Article 5(2); no such exception is to be found in the Race Equality Directive. See further Bell, supra n 4, 181-4.

[11] Although it has been pointed out that age actually receives *lesser* treatment in comparison with the other three grounds in this list, mainly due to the extensive exceptions to be found in the Framework Employment Directive, Article 6. See further H Meenan, "Age equality after the employment directive" 10 MJ 1 (2003) 9, 10. McGlynn has suggested that it is *both* age *and* disability which "occupy the lowest rung": C McGlynn, "EC legislation prohibiting age discrimination: "Towards a Europe for All Ages"?" (2000) 3 C-YELS 279, 294.

[12] Nationality generally, that is. The protection in relation to the free movement of *EU nationals* is extensive. Thus, Martin puts nationality ahead of sex in his hierarchy-of-treatment, as does Warnier: Martin D, *Égalité et non-discrimination dans la jurisprudence communautaire: étude critique à la lumière d'une approche comparatiste* (Bruylant, Brussels 2006) 590; N Warnier, "Les discriminations directes and indirectes dans la domaine de l'égalité homme-femme et de l'égalité nationaux-non-nationaux" Revue de droit international et de droit comparé 2006, v 84, 2e trimester, 225, 285. (EU) nationality discrimination will be dealt with in Chapter 5 below. For one description of the full hierarchy, see G Pitt, "Religion or belief: aiming at the right target?" in Meenan (ed), *Equality Law in an Enlarged European Union* (CUP, Cambridge 2007) 202, 223-4. Another can be found in E Howard, "The case for a considered hierarchy of discrimination grounds in EU law" 13 MJ 4 (2006), 445. Costello and Davies believe that the Court may make use of the general principle of equality to "flatten" the hierarchy: C Costello and G Davies, "The case law of the Court of Justice in the field of sex equality since 2000" Common Market Law Review 2006, v. 43, n. 6, December, 1567, 1574.

[13] "[N]o clear rationale has been given for the greater material and protective scope for sex and race... there is no obvious reason why sex and race should be favoured above the other grounds contained in Article 13": H Meenan, "Conclusion" in Meenan (ed), *Equality Law in an Enlarged European Union* (CUP, Cambridge 2007) 342-3. "[I]t will remain difficult to explain to citizens why one form of discrimination enjoys a higher level of protection in law than another": L Waddington and M Bell, "More equal than others: distinguishing European Union equality directives" Common Market Law Review 2001, v. 38, n. 3, June, 587, 611. "[I]f Article 13 is to be a cornerstone provision of an emerging Union constitution, then the rights of certain citizens should not be more "fundamental" than those of others. By enacting [a specific Directive for

that the "specific characteristics"[14] or "peculiarities"[15] of the different grounds *require* different responses for each[16]. With regards to race, the specific characteristics setting it apart from the other grounds include the fact that there is a political consensus on the need to combat racial discrimination (which there may not be in respect of the other grounds)[17]. With regards to gender, there is the fact that the EC Treaty *itself* appears to privilege this ground over the others[18].

To date only one case based directly on Directive 2000/43 has come to judgment at the ECJ. In *Firma Feryn*[19], a Belgian company specializing in up-and-over doors refused to hire Moroccans to fit its products; one of the company's directors publicly stated this policy both on television and in the press. On a reference from the Brussels Labour Court (an action having been brought by a Belgian public-interest body), the ECJ held that

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race but] a Framework Directive for the other forms of discrimination, one is giving the impression that the right of someone from an ethnic minority to non-discrimination in, for example, the supply of goods and services is more important than that of a homosexual.": Brown, supra n 3, 223.

[14] M Bell and L Waddington, "Reflecting on inequalities in European equality law" (2003) 28 ELRev 349, 368.

[15] H Meenan, "Age discrimination – Of Cinderella and *The Golden Bough*" in Meenan (ed), *Equality Law in an Enlarged European Union* (CUP, Cambridge 2007) 299.

[16] "As such these differences in treatment amount to a recognition of difference rather than the creation of a hierarchy.": Bell and Waddington, supra n 14, 368. "[Taking a differentiated approach to the new grounds] is not to endorse a hierarchy of inequality but rather to acknowledge the differences between them.": B Fitzpatrick, "The "mainstreaming" of sexual orientation into European equality law" in Meenan (ed), *Equality Law in an Enlarged European Union* (CUP, Cambridge 2007) 313 (footnote omitted). Schiek in particular has attempted to explain the differences between the grounds, via her well-known three-pronged categorization in D Schiek, "A New Framework on Equal Treatment of Persons in EC Law?" European Law Journal, v. 8, n. 2, June, 290, particularly at 309-310. "If there are different categories of characteristics, discrimination on grounds of which is forbidden, this may justify differences between different prohibitions to discriminate": Ibid., 310. But for some criticisms of her approach, see Pitt, supra n 12, 224 et seq.

[17] Suggested by Brown, supra n 3, 222. If the consensus argument is accepted, then the apparent favouritism shown to race is not really favouritism at all, but merely "realism" (ibid., 223) or "pragmatism" (Meenan, supra n 15, 299, referring to E Barry, "Different Hierarchies – Enforcing Equality Law" in Costello and Barry (eds), *Equality in Diversity – The New Equality Directives* (Ashfield, 2003) 414). As McGlynn points out, the Commission itself has admitted that its approach was steered by pragmatism: McGlynn, supra n 11, 288, referring to COM(99)564 – see para. 11 of the latter document. Further discussion of the pragmatism rationale can be found in Howard, supra n 12, 451 et seq.

[18] Suggested by Schiek, supra n 16, 300.

[19] Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV.* (ECJ 10 July 2008).

> *"[t]he fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43."*[20]

Turning to "religion or belief", there has as yet been no case under the Framework Employment Directive (which will be discussed in detail in the following sections) in relation to this ground. Indeed, as Bell has pointed out in relation to sexual orientation, "absolutely low levels of litigation" may actually be an "early warning sign" that the Directive is not working[21]. However, the European Court *did* consider the ground some years prior to the passing of the Directive, in 1976 to be precise. In the *Prais* case, Ms Prais requested an alternative date for the written test of a Council *concours*, because the date as it stood clashed with the Jewish festival of Shavuot (Pentacost)[22]. The request was refused, and a subsequent complaint was rejected. Ms Prais then sought the annulment of both the refusal and the rejection before the ECJ. She relied on Article 27(2) of the Staff Regulations, which stipulated that officials were to be selected without reference to race, creed or sex, as well as on the prohibition on religious discrimination (which formed part of the fundamental rights of the individual), and Article 9 of the European Convention for the Protection of Human Rights (ECHR). The Council counter-argued that these instruments were not to be understood as according to Ms Prais the rights which she was claiming; the Council would need an "elaborate administrative machinery" if it had to take account of "all religions" when fixing dates for its tests[23]. The ECJ agreed. The principle of equal treatment in fact worked against Ms Prais, by requiring that the tests should take place on the same conditions for all candidates; this meant that all candidates would have to sit the tests on the same date. The interests of participants in avoiding certain unsuitable dates had to be balanced against this necessity. While the Court admitted that it would be "desirable" that the Council informed itself "in a general way" about dates of religious significance, the instruments cited did not impose a *duty* on it to avoid

[20] Ibid., para. 25.
[21] Bell, "Publication review - Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive" EHRLR 2007, 4, 481-482, 482.
[22] Case 130/75 *Vivien Prais v Council of the European Communities* [1976] ECR 1589.
[23] Quotations from ibid., para. 11.

conflicts, especially when, firstly, it had not been told about Ms Prais' difficulties in good time, and, secondly, other candidates had already been convoked[24].

4.2.2. A Walzerian analysis

4.2.2.1. Implicit bias: Prais v Council

Cases concerning religion and race provide a nice example of what Walzer was describing at the beginning of *Thick and Thin*, discussed above, namely that moral codes do not just fall out of the sky, but that they are in fact the product of the particular history of the people, or peoples, laying claim to them. This means that, despite their claims to universality and neutrality, many such codes may have certain cultural ideas "embedded" within them.[25]

Thus, in a case like *Prais*, the apparently neutral decision, first of the Council and then of the Court, to treat all candidates alike may have *implicitly* favoured candidates belonging to Europe's dominant faith: Christianity. In other words, a hidden "norm" (or "invisible baseline"[26]) is endorsed, and with each endorsement further petrified, so that whatever sacrifices are to be made in the name of "like treatment" are in fact exclusively made by the candidate of the non-dominant faith. This is not a meeting in the middle. Candidates of the non-dominant faith must be leveled, up or down, to "match" those of the dominant faith. It is not as though, for example, a Christian candidate would ever be required to sit an examination on a Sunday (the Community institutions are closed on Saturdays and Sundays). As Danchin has put it (in the context of the "affaire du foulard" in France),

> *"any exception to the general rule […] will be determined by the majority […] typically out of deference to the historical relationship between the nation and its dominant religion. […] [T]his exercise of national*

[24] Quotations from ibid., para. 18.
[25] In the context of sexual orientation, Ball also talks about the role which "personal and intellectual attachments to particular western and liberal contemporary societies" may play in the determination of supposedly universal principles: Carlos A Ball, "Communitarianism and Gay Rights" 85 Cornell L Rev 1999-2000 443, 503.
[26] Peter G Danchin, "Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law" 33:1 Yale J Int'l L 2008 1, 25.

> *sovereignty will be neutral neither towards religion in general, nor to minority religions […] in particular."*[27]

This is reminiscent of Schmitt's famous comment, "The sovereign is: He who decides on the state of exception"[28].

While it is not the intention of this dissertation to second-guess shared understandings – the whole point is that they must be arrived at by the distributive community itself – nevertheless it is fairly certain that the shared understanding of the thing distributed in the *Prais* case, namely a post at the Council, would not contain any reference to the religion of the potential post-holder. To perform work at the Council may require some experience of living in Europe, and no doubt a high level of verbal reasoning and other skills, but it is unlikely to require belief in any particular religion, or in any religion at all. It is true that an examination may have to be held to confirm the candidate's possessing of the (pertinent) experience and skills. However, holding this examination on the feast-day of any non-dominant religion practiced within the Council's jurisdiction allows those who can show a badge of membership of the *dominant* religion (according to whose calendar the date has been set) privileged access to the distributive sphere, while effectively turning away, or at least discouraging, those whose badges say something else. Membership of the dominant religion is thus being used tyrannically, contrary to complex equality.[29] The Court of Justice, if it found the shared understanding of posts at the Council to be as described, would therefore have had to find against the Council, and in favour of Ms Prais. As Danchin points out in a different context, such a finding would require "more than noninterference with the individual's imagined sphere of liberty"; it would require "public recognition of a plurality of different religious and cultural groups and ways of life"[30].

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[27] Ibid. (footnote omitted).

[28] "Souverän ist, wer über den Ausnahmezustand entscheidet": Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität* [Political Theology: Four Chapters towards a Theory of Sovereignty] (Duncker & Humblot, Berlin 1990) 11.

[29] As an alternative to viewing "membership of the dominant religion" as the dominant good in this case, facilitating access of the majority to a good thing (the post at the Council, or at least the possibility thereof), one could also see *Ms Prais* as possessing a negative dominant ("being Jewish", "not being able to attend the test"), which grants access *of the minority* to a bad thing, or "negative good" (exclusion from the test). Walzer discusses negative goods and negative dominance in Chapter 6 of *Spheres of Justice*, on "hard work": M Walzer, *Spheres of Justice – A Defense of Pluralism and Equality* (Basic Books, New York 1983) 165-183. See the discussion at section 2.3. above.

[30] Supra n 2656, 11.

Complex equality would even allow a policy of proportionality, such as Walzer describes in the context of schooling.[31] The Council, as an institution which represents all Member States of the EU, might wish to have a work-force representative of the EU's population (if such an idea formed part of the shared meaning of "a job at the Council") and "not dominated by the… reigning ideologies"[32]. If proportionality were to be a component in the distributive mechanism employed by the Council, then holding the qualifying test on the same day as a Jewish festival would violate this mechanism by preventing an entire constituency within the European population (Jewish people) from having an opportunity to compete. Failure to respect a shared meaning would of course represent a further violation of complex equality. The Court's job would simply be to identify that there had been a flawed distribution, and then, if possible, to right the wrong done.

4.2.2.2. Explicit bias: Firma Feryn

The shared understanding was much less clear-cut or predictable in *Firma Feryn*. Here, the post being distributed was that of a fitter of up-and-over doors. A worrying aspect of the case was that, if Mr Feryn was to be believed, the exclusive hiring of non-Moroccans *was part of* the shared understanding of this post within the relevant distributive community. He repeatedly said in both the press and on television that his customers "[did] not want Moroccans", and "[did not] want them coming into their homes". He continued:

> *"We must meet the customers' requirements. […] I want the firm to do well and I want us to achieve our turnover at the end of the year, and how can I do that? I must do it the way the customer wants it done!"*[33]

Presumably Mr Feryn would therefore argue that he *was* taking a Walzerian approach to the distribution of which he was (ultimately) in charge, and reflecting his community's understanding of what it meant to be a fitter of up-and-over doors, by making sure that no such fitter was of Moroccan nationality.[34] Of

[31] *Spheres of Justice*, supra 29, 221-224.
[32] Ibid., 226.
[33] *Firma Feryn*, supra n 19, at Para. 4 of the Opinion.
[34] Fox describes a similar situation occurring in the US prior to the civil rights revolution: "employment was understood within its own sphere as properly discriminatory – a norm that applied to employers and employees alike (witness the strong support for racist employment policies among white unions)": James W Fox, Jr, "Relational Contract Theory and Democratic

course, one man's testimony cannot be determinative of a shared meaning. There may very well have been in Belgium at that time potential owners of up-and-over doors who did *not* hold the same racist views as Mr Feryn's customers apparently did. But if, for the sake of argument, the shared meaning was indeed as Mr Feryn described it, how is a complex egalitarian to respond? Walzer himself entertains the idea of certain types of homogeneity, including ethnic or religious homogeneity, within certain workplaces:

> *"it may well happen that at a given time, in a given place, the most successful factory will be run largely by Italians, say, or by Mormons. I don't see anything wrong with that."*[35]

However, he draws the line at hiring practices that use *race* as a criterion:

> *"In a society with a long history of racism, it would make sense to rule out racial criteria, hence to impose a minimal set of fair employment practices."*[36]

The *Firma Feryn* case provides an example of the problematic situation discussed in section 2.5. above, where leaving a community to fix its own distributive criteria can lead to nationalism, or worse. As mentioned in that section, the solution is to build into the theory a kind of universal moral code against which the context-dependent principles can be tested, and which, if necessary, can act as an override. It was submitted that Walzer had all along intended that the theory should incorporate such a "thin morality"[37], although he was at pains to point out that even *this* had a particularist dimension that could not be ignored.

Later in the same chapter (section 2.6.), it was discussed how the European Court of Justice already had at its disposal an instrument which represented a kind of "European version" of this thin morality.[38] It was also discussed how

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Citizenship" 54 Case W Res L Rev 2003-2004 1, 41-42. Racism was quite simply "the custom of the relationship": ibid., 42.

[35] *Spheres of Justice*, supra n 29, 162.

[36] Ibid.

[37] M Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (University of Notre Dame Press, Indiana 1994) 12.

[38] It would, in fairness, be *exceedingly* thin, by Walzer's standards. A Council of Europe instrument such as the ECHR, for example, necessarily represents the combined "moralities" of (in 2009) forty seven signatory states, to say nothing of the local "moralities" of the smaller constituent communities *within* these states. But in many ways post-war Europe was facing a "moment[...] of crisis", and was "unite[d] [by] the sense of a common enemy" (Nazism/ Fascism); this justified the construction of "an abstract version, a stick figure, a cartoon" (all

simple it would be to identify any distributive criterion which offended against said morality, and to rule it out. In *Firma Feryn*, the apparently shared rule that no fitters of up-and-over doors may be of Moroccan nationality is just such a criterion. It offends against Article 14 and Protocol 12 of the ECHR. Relying on Europe's Minimal Morality, then, as represented (at least in part) by this instrument, the judge at the ECJ would not have any difficulty in declaring that there had been a flawed distribution.[39] He could then (subject to what is said at section 7.2.1. below) either rewrite the distributive criteria himself, or send the case back to the Labour Court in Brussels for *it* to rewrite them.

4.3. Age

4.3.1. The ECJ's case-law

Age has been described as "particularly difficult"[40], and even "the hardest of the four grounds"[41] covered by the Framework Employment Directive[42]. As discussed above, though,[43] it is less a case of hardness or simplicity, or better or worse, than it is different courses for different horses. The "differences" of age, as a ground for discrimination, are manifold, including the obvious fact that noone's age remains static[44]. In a recent case, Advocate General Mazák

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quotations from *Thick and Thin*, supra n 3798, 18). It could also be argued that in the half-century or so since the War, the signatory states have grown closer and gone through more and more common experiences, lending a sort of communal thickness to the cartoon, and possibly starting to turn it back into a statue.

[39] Fox takes a slightly different route out of the problem (see supra n 34), by using *equal citizenship* as his override. It will be recalled that equal citizenship was mooted as a possible universal or adjudicatory principle, already supplied by Walzer himself in *Spheres of Justice*: see supra, Chapter 2, section 2.5.

[40] Meenan, supra n 15, 284.

[41] T Osbourne, "Will the European Union Directive on equal treatment fulfil its purpose of combating age discrimination in employment?" (2004) The International Lawyer v. 38, n. 3, Fall, 867, 880.

[42] Directive 2000/78. Full citation at n 1, supra.

[43] Text accompanying n 13, et seq.

[44] Of course, one's religion, or one's sexual orientation, or one's being disabled or not, can change over time. But these statuses are very unlikely to change as often, or as inevitably, as age. Advocate General Jacobs has commented that, while a ground like sex involves a "binary criterion", age is "a point on a scale": Case C-227/04 P *Maria-Luise Lindorfer v Council of the European Union* [2007] ECR I-6767, at 6789 (Para. 84 of the First Opinion).

acknowledged the "genuine difference between age and the other grounds", including age's "fluid" nature[45].

Those discriminating on grounds of age have less to fear from Directive 2000/78 than those discriminating on one of the other grounds. For a start, national provisions laying down retirement ages are outside the purview of the Directive[46]. In addition, payments made under state social security schemes, or social protection schemes, are exempted[47]. As well as these two compulsory exemptions, the Directive provides for a number of optional ones (optional on the part of the Member States, that is). The prohibition on age discrimination, for example, need not be applied in respect of the armed forces[48]. The fixing of ages in occupational pension schemes may also contravene the ban, if a Member State so decides[49]. It is Article 6(1) of the Framework Employment Directive, though, which affords Member States the biggest scope to discriminate on grounds of age, or to permit such discrimination, without penalty[50]. The first paragraph reads:

> *"Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if […] they are objectively and reasonably justified by a legitimate aim, […] and if the means of achieving that aim are appropriate and necessary."*

Thus, as long as a legitimate aim can be shown, which passes a standard objective justification test[51] and a standard proportionality test, *any* instance of age discrimination – including *direct* age discrimination - can, theoretically, evade the Directive. As Meenan has rightly pointed out, Article 6(1) is "infinitely elastic"[52]. Waddington and Bell have called it "open-ended"[53]. Others have

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[45] Case C-388/07 *Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ECR I-1569, at Para. 74 of the Opinion.
[46] Recital 14.
[47] Article 3(3).
[48] Article 3(4).
[49] Article 6(2). Skidmore has commented that this derogation "runs the risk that it may result in other forms of discrimination": P Skidmore, "EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy?" (2001) 30 ILJ 126, 130.
[50] Schiek has described Article 6 as being "loaden with exceptions": Schiek, supra n 16, 301.
[51] It was argued in the *Age Concern* reference (Case C-388/07 *Age Concern*, supra n 45), by Age Concern, that the additional words "and reasonably" added an extra hurdle to the objective justification test in Article 6(1). However, this argument was rejected by both the Advocate General (see Para. 79 of the Opinion) and the Court (see Para. 65 of the Judgment).
[52] Meenan, supra n 15, 297.

gone even further, accusing Article 6(1) of "legalis[ing] age discrimination"[54] and warning that the exception "could end up swallowing" the rule[55].

Age was in fact the subject of the very first preliminary reference made to the Court of Justice specifically on Directive 2000/78: *Mangold v Helm*[56]. The case concerned the use of fixed-term employment contracts. In Germany, the law placed two curbs on the use of fixed-term employment contracts (in order to prevent their misuse), requiring an *objective reason* justifying the fixed term, or, alternatively, imposing limits on the *number of renewals* (three) or on *duration of use* (two years). However, German law permitted fixed-term contracts, even without the above restrictions, if the employee was *aged 60 or over*. When Germany came to transpose Directive 2000/78, by means of the "Law on part-time working and fixed term contracts"[57] (the "FTC Law"), this threshold was lowered to *58*. In 2002, the threshold was again lowered, by the so-called "Hertz Law", to *52*.

In 2003, at the age of 56, Mr Mangold was hired by Mr Helm (a lawyer) on a fixed-term employment contract; the contract contained no objective justification, or stipulation of a maximum number of renewals, or stipulation of a maximum duration. In proceedings brought by Mr Mangold, the Court of Justice was asked whether there was an incompatibility between EC law (in particular, Directive 2000/78) and the German laws which deprived employees over 58 (and later 52) of legal protection against abuse, by employers, of this kind of contract.

Advocate General Tizzano recalls the wording of Article 6(1) of the Directive, and then comments that the difference in treatment on grounds of age (as between those who can enter into fixed-term contracts without restrictions, and those who cannot) "is… self-evident"[58]. He goes on to opine that this difference in treatment is objectively justified, albeit implicitly, by the aim of "enhancing the

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[53] Waddington and Bell, supra n 13, 599.
[54] Eurolink Age cited in Waddington, "Article 13 EC: Setting Priorities in the Proposal for a Horizontal Employment Directive" (2000) 29 ILJ 2, 176, 179, discussing the Directive when it was still at the proposal stage.
[55] Osbourne, supra n 41, 874.
[56] Case C-144/04 *Mangold*, supra n 2.
[57] Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen.
[58] Case C-144/04 *Mangold*, supra n 2, at 10004 (Para. 88 of the Opinion).

employability of unemployed older workers who… have particular trouble finding new employment"[59]. In other words, the lack of a requirement to provide protection to the potential employee boosts his or her prospects of employment, as the employer will find such a candidate more attractive than one for whom protection must be provided. However, according to the Advocate General, this objective justification fails the proportionality test. The denial of stability within the employee's employment relationship, which on the Advocate General's reading of the rules could start as early as the age of *50*, and would last until retirement, is therefore permanent. Such permanent "exclusion from… safeguards"[60] is, in Tizzano's view, disproportionate.

The Opinion ends with consideration of a small point which has gone on to have a big significance. The Advocate General suggests that, in declaring the German laws to be incompatible with EC law, the Court should use, *not* Article 6 of Directive 2000/78, but the general principle of equality itself. After all, the analysis (difference in treatment, objective justification, proportionality) would be identical. The benefit would be that general principles have horizontal direct effect, while Directives do not (and, in any case, the deadline for transposition of the Directive had not, at the material time, passed).

The Court largely follows its Advocate General. The difference in treatment on grounds of age, brought about by the FTC Law and the Hertz Law, would be discrimination unless the conditions listed in Article 6(1) were met. As regards objective justification, the Court, like Advocate General Tizzano, was satisfied that the German laws served the purpose of

> *"promot[ing] the vocational integration of unemployed older workers, in so far as they encounter considerable difficulties in finding work."*[61]

Turning to proportionality, the Court commented that Member States had a "broad discretion in their choice of measures [to achieve employment policy objectives]"[62]. However, the FTC Law, combined with the Hertz Law, deprived *all* workers over the age of 52 of protection against abuse by employers, via indefinitely renewable fixed-term contracts, and therefore of "stable

[59] Ibid. (Para. 90 of the Opinion).
[60] Ibid., at 10005 (Para. 96 of the Opinion).
[61] Ibid., para. 59.
[62] Ibid., para. 63.

employment"[63]. It made no difference "whether or not they were unemployed before the contract was concluded"[64], or what the duration of any period of unemployment had been. This failure by the German authorities to take into consideration "the personal situation of the person concerned"[65], or indeed the structure of the labour market as a whole, meant that the German law went "beyond what [was] appropriate and necessary"[66]. The imposition of what might be called a "blanket" age-threshold meant that Germany had failed the proportionality test.

Finally, the Court picked up Advocate General Tizzano's point about the preferability of using the general principle of equality in deciding this case, rather than the Directive. However, in a controversial move, the Court went further, by claiming that the principle of non-discrimination *on grounds of age* was *itself* a general principle of Community law[67].

The Court's baptism of a general principle of non-discrimination *on grounds of age* has provoked ire among some critics[68], who are unconvinced as to the sources[69] of the new principle (which are, according to the Court, various international instruments, including the ECHR and the ICCPR, and "the constitutional traditions common to the Member States"[70]). It is well known that at the time of the drafting of the Amsterdam Treaty, the Member States, while happy to countenance the new Article 19 (then Article 13), were adamant that it should *not* create rights of general application[71]. Furthermore, many writers speculate as to whether a precedent has now been set, allowing all of the other grounds covered by Article 19 to be "upgraded" (to use Muir's word) to general

[63] Ibid., para. 64.
[64] Ibid.
[65] Ibid., para. 65.
[66] Ibid.
[67] Ibid., para. 75.
[68] Although Meenan describes it as "enormously helpful": Meenan, supra n 15, 306.
[69] Or "alleged sources" as Arnull puts it: A Arnull, "Editorial: Out with the old..." (2006) 31 EL Rev Feb 1, 2.
[70] Case C-144/04 *Mangold*, supra n 2, at para. 75.
[71] This can be confirmed by contrasting the wording of Article 19 TFEU (then Article 13 EC) with Article 18 TFEU (then Article 12 EC) prohibiting discrimination on grounds of nationality, as discussed by E Muir, "Enhancing the effects of Community law on national employment policies: the *Mangold* case" EL Rev 2006, 31(6), 879, 889.

principles[72]. If so, this in turn raises questions about how certain other cases were decided[73].

Almost two years after *Mangold*, the ECJ gave judgment in the case of *Palacios de la Villa v Cortefiel[74],* which concerned compulsory retirement in Spain. A Spanish law of 2005 legalized compulsory retirement clauses within collective agreements; workers over a given age could be compulsorily retired as long as this was "consistent with employment policy" (the "employment policy aim"), and as long as they had completed the minimum contribution period for a pension. The 2005 law was given retrospective effect by means of the so-called "Single Transitional Provision" (the "STP"), although the STP mentioned only the second of those two conditions, not the first. In proceedings brought by Mr Palacios de la Villa against his employer Cortefiel, on being compulsorily retired at 65 pursuant to the relevant collective agreement, the Court of Justice was asked whether the STP was precluded by the principle of equal treatment.

Advocate General Mazák was of the opinion that the STP was not covered by the Framework Employment Directive, because retirement ages were exempted from the remit of the Directive by Recital 14[75]. The Court of Justice disagreed. The matter at issue was the prevention of future participation in the labour force. This fell within Article 3(1)(c) of the Directive, which provided that the Directive would apply to "employment and working conditions, including dismissals and pay". Turning to Article 6(1), the Court acknowledged that no employment policy aim was mentioned explicitly in the STP, but nevertheless held that such an aim (in this case, regulating the national labour market for the purposes of checking unemployment) could be inferred from the context. As regards the proportionality test, the Court felt that the taking of this particular measure in order to facilitate access to the labour market (in other words, removing older workers in order to free up posts for younger workers) was "not unreasonable"[76]. Also counting in favour of Spain's conduct were the fact that a safeguard condition had been included to ensure that no older worker was retired before they had earned a full pension, and the fact that the "compulsory retirement

[72] Ibid., 889-890; Meenan, supra n 15, 306; Arnull, supra n 69, 2.
[73] See below, text accompanying n 116.
[74] Case C-411/05 *Félix Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531.
[75] In the event that the Court came to the opposite view, the Advocate General's alternative submission was that the STP was justified and proportionate.
[76] Case C-411/05 *Palacios,* supra n 74, para. 72.

mechanism"[77] could only be used in the context of a collective agreement, which ensured flexibility, and consideration of any industry-specific factors. In the light of all of this, the Court's conclusion was that Spain's action in passing the STP had been "appropriate and necessary". No mention was made of the general principle of non-discrimination on grounds of age from *Mangold*.

O'Cinneide has commented that, in *Palacios*, the objective justification test was applied "with considerable rigour", with the justification itself being subjected to "close scrutiny"[78]. Connolly meanwhile appears to take the opposite view, criticizing the Court for its "generous" approach (or "light touch" as he puts it) in accepting an implicit purpose for the STP, discerned from "evidence", as opposed to an explicit one. He regards *Palacios* as a "*departure* from the stricter approach" of cases like *Mangold*, with the Court apparently prepared to approve "vague" goals as justifications; according to him, Spain's attempt to redistribute jobs from the old to the young is little more than a "ruse", leaving "those most in need of protection" without it[79].

The issue of compulsory retirement has returned to the Court of Justice in the form of the *Age Concern* reference[80]. Here, the English charity Age Concern (among others) has sought a judicial review of certain provisions of the Employment Equality (Age) Regulations 2006, which is one of the measures adopted by the UK for the purpose of transposing Directive 2000/78. Age Concern argues that the transposition is flawed. According to Age Concern, Article 6(1) does not permit Member States to introduce a *general* defence of justification for direct age discrimination, but that is just what the Regulations do (in stipulating that employers may dismiss employees at the age of 65 without having to show any objective justification whatsoever). According to Age Concern, for the Directive to be correctly transposed, the discriminator (that is, the employer) would *still* need to show a legitimate aim, and proportionality. The UK disputes this. The High Court made a reference to Luxembourg.

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[77] Ibid., para. 74.

[78] Both phrases from C O'Cinneide, "Age Discrimination and Mandatory Retirement" [2008] 6/7 European Anti-discrimination Law Review 13, 15.

[79] Quotations from M Connolly, "The ECJ signals a light touch towards age discrimination and compulsory retirement" Emp LB 2007, 81(NOV), 1, 3 (emphasis added).

[80] Case C-388/07 *Age Concern*, supra n 45.

In September 2008, Advocate General Mazák delivered his Opinion. He found without difficulty, following *Palacios*, that the Regulations fell within the scope of the Directive. Turning to the substance, Age Concern had argued that the Member States had to *specify* which differences in treatment were potentially capable of being justified, and had to *specify* what aims were capable of justifying such differences. The national court in its questions had referred to the possibility of the Member State drawing up a "list" to define the justifiable differences. The UK rejected Age Concern's argument, and stated that a list would be unrealistic and inappropriate. The Advocate General agreed; implementing legislation had to be specific and sufficiently clear (which, in his opinion, the Regulations were), but a list would be "impossible"[81]. Thus, the Regulations were not incompatible with Article 6(1). Member States (but not, importantly, individual employers) needed to proffer an identifiable (although not necessarily express) "legitimate aim", and the means employed to achieve it needed to be "appropriate and necessary". However, the Advocate General left it to the national court to decide whether, in this particular case, these two obligations had been discharged.

In March 2009, the Court handed down its judgment. Having confirmed that the Regulations did fall within the scope of the Directive, the Court went on to explain that, when transposing a directive, Member States had to make sure that the implementing law was effective, but that they retained a broad discretion as to the *methods* to be used. Thus, the UK could not be impugned for having chosen not to draw up a list of justifiable differences. Neither did it matter if legitimate aims were not stated explicitly, as long as they could still be identified. However, both the ascertaining of the legitimate aim, *and* the proportionality test, were jobs for the national court. The only guidance which the Court would give was that, when weighing up whether a specific measure was "appropriate and necessary", the national court should reject "[m]ere generalizations"[82]; a generalization could not constitute evidence of the suitability of a measure for its purpose.[83]

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[81] Ibid., at Para. 54 of the Opinion.

[82] Case C-388/07 *Age Concern*, supra n 45, para. 51.

[83] It is worth noting that the UK's Regulations did *not* contain a safeguard condition, like the one in *Palacios*, requiring that employees not be compulsorily retired if they had not yet acquired sufficient pension entitlements. As the safeguard condition was such a key plank in the Court's finding (in *Palacios*) that the STP was proportionate, surely the absence of such a condition can only lead to a finding of *lack of* proportionality? This point is made by both O'Cinneide (supra n

Finally, a quick mention might be made of the recent case of *Petersen*[84]. Here, a German dentist was informed that her authorization to provide "panel" dental care (that is, dental care to those insured under the statutory health insurance scheme) was to expire when she reached the age of 68. Ms Petersen having brought an action, a reference was made to the ECJ asking the Court whether setting a maximum age of 68 for practice as a panel dentist was an objective and reasonable measure to protect the health of patients insured under the statutory scheme. The Court in fact looked at *three* possible justifications for the German rule, which it said had been "mentioned" by the referring court, although only the first had been "relied on".[85] With regard to this justification, the Court held that, given that there was an exception to the rule to the effect that dentists *outside* the panel system *could* work on after 68, the proffered objective of protection of public health could not be regarded as legitimate. However, the Court said that the rule could potentially be justified on both of the other grounds, namely, the protection of the financial balance of the German health system and the need to distribute employment opportunities among the generations.

4.3.2. A Walzerian analysis

Complex equality is very well suited to the task of helping judges to decide discrimination cases owing to its novel focus on distribution, which facilitates the exposure of one of the mainsprings of discrimination: assumptions. That assumptions are one of the major sources of discrimination, across all grounds, has been well explained by Bell (in the gender and sexual orientation discrimination contexts), McGlynn (in the age discrimination context) and Quinn (in the disability discrimination context). Bell writes:

> *"Discrimination against women is largely based on... gender-based assumptions relating to [women's] social role. The physical sex of the individual may be the marker through which discrimination is visualized, but it is not the physical characteristics of women per se which is at the*

78 at 19) and Connolly (supra n 79 at 4). For an interesting analysis of the ECJ judgment, see M Connolly, "The Heyday case: much ado about very little" Emp LB 2009, 90 (Apr), 2.

[84] Case C-341/08 *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* (ECJ 12 January 2010).

[85] Ibid., para. 38.

> *root of the discrimination against them. In other words, a woman is not denied promotion to management level because the employer believes her physical body is inappropriate, but because of arbitrary and prejudicial assumptions about the capabilities of women as a social group, and their proper place in society. The underlying objective of anti-discrimination legislation in this perspective is to breakdown [sic] such gendered stereotypes."*[86]

But sometimes the anti-discrimination legislation not only fails to break down the stereotypes, it reinforces them. McGlynn's concern, for example, is not so much the way assumptions inform the thinking of society's discriminators (such as employers), but the way in which they pervade even the legislative arena, so that "objective" justifications for discrimination suggested by an instrument like the Framework Employment Directive are little more than these same assumptions, repackaged:

> *"[T]he suggested legitimate justifications for differential treatment on grounds of age in [the Framework Employment Directive] may be based on assumptions regarding national retirement ages […]. Equally, justifications for age discrimination based on requirements of professional training, for example, may also be based on ageist assumptions regarding the nature of the labour market and the desirable age of employees. […] These assumptions appear to be out of step with the moves towards a more flexible labour market, "portfolio" careers and the removal of assumptions about the nature of jobs and the nature of the employees required to fill them."*[87]

Tyranny, as has been explained before, involves having a "badge" from another sphere, which actually only has Meaning X, but which is allocated Meaning Y by the gate-keepers of the neighbouring sphere. This in turn involves making an *assumption*; the gate-keepers of the neighbouring sphere do not need to examine each newcomer separately, when they can simply rely on a long-held rule of thumb ("If something has Meaning X, it must also have Meaning Y"). Quinn describes this very well:

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[86] M Bell, "Shifting Conceptions of Sexual Discrimination at the Court of Justice: from *P v S* to *Grant v SWT*" European Law Journal, Vol. 5, No. 1, March 1999, 63, 65. Bell's emphasis, footnote omitted.

[87] Supra n 11, 290-1. Even the judiciary is not immune to assumptions. In the religious discrimination case of *Şahin v. Turkey* (Application No. 44774/98, 10 November 2005), the European Court of Human Rights justified the inequality caused when Ms Şahin was forced to obey a secular dress code, by reasoning that the wearing of the Islamic headscarf was "perceived as a compulsory religious duty", imposed by men, sometimes against the wishes of the wearer, thus violating the "equality before the law of men and women" (paras. 115-116). In his dissenting judgment, Judge Tulkens strongly admonished the majority for relying on mere *perceptions* about this particular religious practice and its application (see the Dissenting Opinion of Judge Tulkens, para. 12), which Danchin went as far as to call "an essentialized and unexamined set of assumptions": Danchin, supra n 26, 27.

> *"[D]iscrimination may be motivated… by the use of proxies or stereotypes concerning the assumed characteristics of group members. […] Disability is commonly – and mistakenly – taken as a proxy for inability to perform the routine tasks of life. […] [I]t is… impermissible to use [the proxies] to cloud rational judgments about individual ability since it is always possible that individuals will not conform to the stereotype. It is fundamentally unfair not to afford everyone an equal chance of proving themselves. […] [T]he proxies are highly inaccurate and rest on encrusted layers of unexamined presuppositions that have piled up over the centuries."*[88]

As might be predicted, assumptions make for very porous boundaries between spheres, and are thus prime targets for the complex egalitarian.

In a case like *Age Concern*, what is really being distributed (from a Walzerian point of view) is *continued employment*, with *youth*, at least potentially, acting as a dominant good.[89] When a worker under the age of 65 flashes their "badge of youth", youth is apparently converted into "ability to do the job"[90], and access to the sphere of employment is granted (or extended). As Walzer himself puts it,

> *"[t]he conversion process violates the common understandings of the goods at stake".*[91]

A judge would hear evidence from both sides. Counsel for the Government might well claim that the common understanding of work in the UK *was* that only younger people could do it, meaning that, in fact, there had been no boundary breach at all. But this would obviously have to be convincingly proven. If it was not (as seems likely), the judge could conclude without difficulty that the distribution of work in the UK was flawed, and could then speedily move on to the arguably more important business of putting this right (or of sending the

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[88] G Quinn, "Disability discrimination law in the European Union" in Meenan (ed), *Equality Law in an Enlarged European Union* (CUP, Cambridge 2007) 231, 244-5. Miller regards *income* as one of the most important proxies. If a person has a high income, it is often, if wrongly, assumed that they must have the skills to succeed in all of the other spheres: D Miller, "Complex Equality" in D Miller and M Walzer (eds), *Pluralism, Justice, and Equality* (OUP, Oxford 1995) 213.

[89] It would also, of course, be possible to view the case the other way around – the distribuend would then be *compulsory retirement*, and the (negative) dominant would be *old age*.

[90] For the purposes of this section, it is taken for granted that "ability to do the job" is the correct (and only) distributive criterion within the sphere of employment. Of course a distributive community might settle on a different "shared meaning" of employment.

[91] *Spheres of Justice*, supra n 29, 12.

matter back to the UK for rectification there).[92] No protracted, not to mention distracting, comparison between those under 65 and those over that age would be remotely necessary. It can thus be seen how use of Walzer's theory would enable a judge to pinpoint, with ease, the true core of the case, that is, the false assumption being made and perpetuated on the boundary between the two spheres at issue.[93]

Exactly the same boundary breach, predicated on the same assumption, can be observed in *Mangold* and *Palacios* (although the exact distribuends vary). In both cases, it is a natural or legal person who has allegedly discriminated on grounds of age, not a Member State.[94] But for the purposes of this section it makes no difference to the outcome. Counsel for Mr Helm would have to convince the judge that being young formed part of the common understanding of a restricted fixed term employment contract (and the employment certainty that went with it) in Germany. And counsel for Cortefiel would have to convince the judge that being young formed part of the common understanding of continued employment (the same task as the UK's in *Age Concern*) in Spain.

Another case where Walzer's theory would facilitate the pinpointing of the true core of the case would be *Petersen*. Here, those able to show the "badge of youth" were accorded authorizations to provide panel dental care, while those over 68 came away empty-handed. The Court reasoned that the fact that the age restriction did not apply vis-à-vis non-panel work fatally undermined the German Government's claim that its purpose was to protect public health. This reasoning is sound, but relies on comparison between the two sectors to show up a contradiction in the German Government's approach; the danger is that if the age restriction had been applied across the board, the Court would have found it to be justified. This kind of approach fails to answer the question which the case is really about: do dentists over 68 make more mistakes than any other dentists? A complex egalitarian would ask whether the fact of being below 68 formed part of the *meaning* of dental care, and the provision thereof. While in

[92] Of course, in the event, the Court of Justice's contribution to this case was entirely technical, thus shunting the *whole* of the principle issue (age discrimination) back to the national court.
[93] The Sphere of Employment and the "Sphere of Age". It is wholeheartedly admitted that the latter "sphere" is difficult to picture, unless age is (continuously) distributed to man by Old Father Time. However, a non-literal reading of Walzer's theory is urged. See section 3.3. for more on whether characteristics are (or even need to be) distribuends.
[94] Although Member State *legislation* is very much at stake.

this case both approaches might well have led to the same result (with the age restriction failing the justification test – at least on this ground), it is submitted that the Walzerian approach reaches the result via the more appropriate route.

4.4. Sexual Orientation

4.4.1. The ECJ's case-law

This section will begin with an appraisal of the European Court of Justice's approach to the question of transsexuality in the landmark case of *P v S*[95]. It is stressed that this is not to imply that a person's transsexuality has anything to do with their sexual orientation. It does not, and indeed the Court acknowledged this in *P v S*, where the Luxembourg judges rightly recognized that transsexuality, and gender reassignment, are a matter of gender[96]. However, although the judges were prepared to stretch their traditional understanding of the concept of gender to aid a transsexual employee, in the later case of *Grant*[97], they famously drew the line at aiding a homosexual one, at least until there was a stand-alone prohibition for discrimination on grounds of orientation[98]. In order to understand *Grant* and its successors it is thus helpful to keep in mind the transsexuality cases, starting with *P v S*.

Transsexuality usually involves a medical condition called gender disphoria, wherein the patient's biological sex (sometimes called "chromosomal" sex) does not correspond to their sexual identity; in most cases, the condition can be

[95] Case C- 13/94 *P v S and Cornwall County Council* [1996] ECR I-2143.
[96] As Waaldijk and Bonini-Baraldi explain, the concept of "sexual orientation" is sometimes given a wider meaning to include phenomena that are related to (what they call) "sex-as-gender", such as transsexuality or transvestism. And indeed in some Member States' laws, "sex-as-gender" phenomena have been included within the concept of sexual orientation, for example, transvestism in Denmark. However, in the light of *P v S*, Waaldijk and Bonini-Baraldi are of the view that the appropriate course is to treat transsexuality as a matter of sex, not sexual orientation. See further K Waaldijk and M Bonini-Baraldi, *Sexual orientation discrimination in the European Union: national laws and the Employment Equality Directive* (TMC Asser Press, The Hague 2006) 96-97. Others regret the submerging or "covert inclusion" of "discrimination by reason of gender reassignment" within the general category of sex, and would prefer to see *gender identity* as an autonomous ground. See M Bell, *Anti-Discrimination Law and the European Union* (Oxford Studies in European Law, OUP, Oxford 2002) 110, with reference at footnote 123 to a failed initiative by ILGA-Europe.
[97] Case C-249/96 *Grant*, supra n 2.
[98] Ibid., para. 48.

eased by medical treatment culminating (if desired) in surgery for gender reassignment. P was a manager at an educational establishment, of which S was the principal and chief executive. P was a transsexual whose biological sex was male, but whose sexual identity was female. (In the UK at the material time, it was impossible to have the sex originally attributed to a person altered in the register of births, marriages and deaths). P was dismissed after she[99] underwent gender reassignment surgery, and brought an action claiming sex discrimination. The Industrial Tribunal at Truro made a reference.

Advocate General Tesauro was not convinced by the argument (made by the UK) that the correct comparator for a male-to-female transsexual was a female-to-male transsexual (who of course would have been treated equally badly, meaning that there could not have been any gender discrimination – the so-called "equal misery" argument). Rather, he imagined what things would have been like if P had remained a man. Obviously, in that case, she would not have been dismissed. He concluded:

> *"where unfavourable treatment of a transsexual is related to […] a change of sex, there is discrimination […] on grounds of sex"*[100]

To argue that this was not discrimination "between the two sexes"[101] would be, he said, "quibbling"[102]. The Advocate General called for a "broader perspective"[103], and warned the Court against making what he saw as a "moral condemnation"[104] of transsexuals. Because there was "no precise provision" on point, he explained in closing, what was needed was equality *by inference*.[105]

The Court answered the call made by its Advocate General, and, in a very short decision, similarly rejected the "equal misery" argument. According to the Court,

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[99] It is proposed to follow Advocate General Tesauro's lead in referring to P as a female, that is, taking into account her sexual identity as opposed to her biological sex: Case C- 13/94 *P v S*, supra n 95, at 2146 (Para. 4 of the Opinion).
[100] Ibid., at 2154 (Para. 18 of the Opinion).
[101] Ibid., at 2155 (Para. 20 of the Opinion). Indeed, as Flynn points out, since at all times P remained *legally* a man, technically the comparison offered by Tesauro, and later the Court, is *between two men*. Flynn, "Case Note on *P v S and Cornwall County Council*" (1997) 34 CML Rev 367, 377.
[102] Ibid.
[103] Ibid., at 2156 (Para. 23 of the Opinion).
[104] Ibid., at 2157 (Para. 24 of the Opinion).
[105] Ibid.

the Equal Treatment Directive[106] included within its scope discrimination arising from gender reassignment. It continued:

> *"Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment."*[107]

S's behaviour in dismissing P was therefore precluded by the Directive.

Almost two years after the judgment in *P v S* came the case of *Grant*[108]. Ms Grant was engaged as a clerical officer by (the company which became) South-West Trains in 1993. Mr Potter, her predecessor, had obtained travel concessions for his "female cohabitee", pursuant to the employment contract in conjunction with the Staff Travel Facilities Privilege Ticket Regulations ("the Regulations"). However, when Ms Grant applied for travel concessions for *her* female cohabitee, pursuant to the same two documents, in 1995, she was refused. The reason given was that, according to the Regulations, travel concessions were only granted to common law spouses (with whom a "meaningful relationship" had been shared for two years or more) of the *opposite sex*, not of the *same sex*. Ms Grant brought an action for sex discrimination, and the Industrial Tribunal at Southampton made a reference.

Advocate General Elmer, first holding that travel concessions were equivalent to pay, proceeded to consider the case under Article 119 EC[109] alone. Considering the same quotation as that given above[110], he noted that the Court in *P v S* had found for P, not because she had been discriminated against on grounds of *transsexuality* (although she had been), but because she had been discriminated against on grounds of *sex*. He further noted that the Court had rejected the "equal misery" argument (male transsexuals and female transsexuals treated alike), and had thus taken "a decisive step away from an interpretation of the principle of equal treatment based on the traditional

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[106] See supra n 10.
[107] Case C- 13/94 *P v S*, supra n 95, para. 21 (emphasis added).
[108] Supra n 2.
[109] Subsequently Article 141 EC, now Article 157 TFEU.
[110] Text accompanying n 107.

comparison between a female and a male employee"[111]. Posing the question whether gender was the causative factor (of the unfavourable treatment) in *this* case, the Advocate General observed that the Regulations made the travel concessions conditional on the cohabitee's being of the "opposite sex" to the employee. Thus, gender was in fact "the *only* decisive criterion"[112]. South-West Trains' behavior was therefore, in Elmer's view, gender discrimination within the meaning of Article 119. Furthermore, as it was direct discrimination, it could not, in his view, be objectively justified.

The Court, however, took a different view. The first question it asked itself was whether the Regulations constituted discrimination based directly on the sex of the worker. Ms Grant had been refused the travel concessions simply because she did not satisfy the conditions, conditions which applied regardless of the sex of the worker concerned. Using the "equal misery" argument, the Court went on:

> *"Thus travel concessions are refused to a male worker if he is living with a person of the same sex, just as they are to a female worker if she is living with a person of the same sex."*[113]

South-West Trains' behaviour could not therefore be regarded as discrimination on grounds of sex. The second question which the Court asked itself concerned the following three categories of relationship:

1 stable relationships between two persons of the same sex;

2(a) stable relationships outside marriage between two persons of opposite sex;

2(b) marriage between two persons of opposite sex.

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[111] Case C-249/96 *Grant*, supra n 2, at 627 (Para. 15 of the Opinion).

[112] Ibid., at 629 (Para. 23 of the Opinion), emphasis added. However, as he goes on to discuss, that meant not just the gender of the employee, *but also the gender of the cohabitee.* He concludes, though, that use of an "abstract criterion", like "opposite sex", could "make no difference" (Paragraph 25). It is interesting to note how useful the doctrine of *associative discrimination* would have been to Ms Grant here. But of course the Court did not recognize this doctrine until the case of *Coleman v Attridge Law* in 2008 (see below n 181, and accompanying text). Alternatively, one could hold, as Barnard does, that the complainant remains the only object of scrutiny, but that she is scrutinized with regard to two attributes, not just one: "gender plus sexuality". As she continues: "Yet, for a valid sex discrimination analysis, the comparison must change only the sex of the complaining individual and must hold all other circumstances constant.": C Barnard, "Some are more equal than others: the decision of the Court of Justice in *Grant v South-West Trains*" (1999) 1 C-YELS 147, 153.

[113] Case C-249/96 *Grant*, supra n 2, para. 27.

The Court needed to ascertain whether Community law required that Category 1 should be regarded by all employers as equivalent to Category 2(a) or Category 2(b). The Court held that, although Member States were increasingly treating Category 1 as equivalent to Category 2(a) or Category 2(b), the *Community* had not yet adopted rules providing for such equivalence. Thus, in the Court's opinion, the correct way to proceed was to continue to regard Category 1 as *not equivalent* to Categories 2(a) or (b), an approach which had been endorsed by the European Court of Human Rights (or at least its Commission)[114]. Thus, South-West Trains was *not* required to treat the situation of Ms Grant and her partner as equivalent to that of Mr Potter and his partner.

The final question which the Court asked itself was whether discrimination on grounds of sexual orientation *constituted* discrimination on grounds of sex. Having held that *P v S* was to be confined to its facts (that is, was relevant only to cases involving gender reassignment), the Court answered this question in the negative; discrimination based on sexual orientation was not covered by Article 119[115].

Grant was of course decided before the Framework Employment Directive, so that Ms Grant's main problem was to try to shoehorn a *sexual orientation-discrimination* point into the *sex-discrimination* regime. With sexual orientation's now having its own, dedicated prohibition, it is highly unlikely that she would have lost had the case been brought today. However, the age case of *Mangold*[116] now poses an odd riddle. If all of the Article 19 grounds are (and therefore always were) general principles of Community law (as age was declared to be in that case), then why could the (supposed) general principle of non-discrimination *on grounds of sexual orientation* not be invoked by the Court in *Grant*?

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[114] Ibid., para. 33, and the case references therein.

[115] As Bell has written, "*Grant* was crucial in creating a separation in Community law between "sex" and "sexual orientation"."": Bell, supra n 96, 110. But not all writers agree with this "separation". WIntemute, for example, believes that discrimination on the grounds of sexual orientation *is* sex discrimination: R Wintemute, "Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes" 60 (1997) MLR 334, cited and discussed in Barnard, supra n 112, 153-4. Barnard refers to Wintemute's argument as "fancy footwork" – ibid., 154 – and then proceeds to offer her own version – ibid., 155-8. The conflation of sex discrimination and sexual orientation discrimination is also the favoured approach of the Human Rights Committee when interpreting the ICCPR: *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

[116] Case C-144/04 *Mangold*, supra n 2.

Critics have made much of the inconsistencies between *P v S* and *Grant*, the most obvious difference being the Court's rejection of the "equal misery" comparison in the former, and acceptance of the same in the latter. Canor calls this "interpretative acrobatics"[117]. She cites Flynn, who in 1997 (a year before *Grant*) wrote that the correct comparator for a female employee who is sexually attracted to or has sexual relations with women is a *male* employee who is sexually attracted to or has sexual relations with women[118]. Had the Court in *Grant* taken this view, it would effectively have been comparing Ms Grant with Mr Potter, which was what she wanted all along. The comparison proposed by Flynn is also regarded as the correct one for *Grant* by Koppelmann[119] (who makes a scathing attack on the "equal misery" comparison actually chosen), and, it would seem, by Mancini and O'Leary[120]. Others question the need for comparison at all, and wonder whether the establishment of detriment to Ms Grant could have been sufficient on its own, by analogy with *Dekker*[121], a pregnancy case[122]. These include Bell[123], who furthermore regards *P v S* and *Grant* as "impossible to reconcile"[124], and Carey, who also mentions the non-comparative approach[125]. Carey refers to the Court's "illogical application of tests" and "incoherence"[126]. He puts the apparent u-turn down to the relative sizes of the two communities at issue, with the Court perhaps being encouraged by the small number of transsexuals in the EC, only to then be discouraged by the large number of homosexuals (and the "potentially significant financial

[117] Canor, "Equality for Lesbians and Gay Men in the European Community Legal Order – "they shall be male and female"?" 7 MJ 3 (2000) 273, 276.
[118] Flynn, supra n 101, 382, cited in ibid., 278.
[119] A Koppelman, "The Miscegenation Analogy in Europe, or, Lisa Grant meets Adolf Hitler" in Wintemute and Andenæs (eds), *Legal recognition of same-sex partnerships: A study of national, European and international law* (Hart Publishing, Oxford 2001).
[120] GF Mancini and S O'Leary, "The New Frontiers of Sex Equality Law in the European Union" European Law Review, Vol. 24, No. 4, August 1999, 331, 350.
[121] Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941. See supra, Chapter 3, text accompanying n 37, et seq.
[122] For a nice discussion of the pros and cons of this approach, albeit written a year before *Grant*, see Flynn, supra n 101, 376 et seq.
[123] M Bell, "Shifting Conceptions of Sexual Discrimination at the Court of Justice: from *P v S* to *Grant v SWT*" European Law Journal, Vol. 5, No. 1, March 1999, 63, 67 and 74.
[124] Ibid., 74.
[125] N Carey, "From obloquy to equality: in the shadow of abnormal situations" Yearbook of European Law 2001, n. 20, 79, 100.
[126] Ibid., 99.

consequences" of a positive ruling)[127]. But as he rightly states, "equality should apply, by definition, to everyone and not just a group occupying a given minimum percentage of the population"[128]. As well as this economic motive for the Court's behaviour[129], others have also detected a political, or even a moral, one[130].

The Court had another opportunity to consider the equivalence or otherwise of same-sex partnerships and marriage in the 2001 case of *D and Kingdom of Sweden v Council*[131], this time with the added complication that the Member State concerned (Sweden) permitted the legal registration of same-sex partnerships, and that under Swedish law registered partners were treated as equivalent to married persons. D was a Swedish official of the Council, who was in a registered partnership with another Swedish national. D requested that the Council should treat his status as registered partner as equivalent to marriage in order for him to be entitled to the so-called "household allowance". However, the Council refused on the grounds that the Staff Regulations did *not* allow a registered partnership to be treated as equivalent to marriage. On an application for annulment of this refusal, the Court of First Instance found for the Council.

On appeal to the Court of Justice, D, supported by Sweden, claimed inter alia that the Council was bound by the provisions of Swedish law. However, Advocate General Mischo, referring to the famous free movement case of *Reed*[132], stated that any interpretation of a legal term on the basis of social developments must take into account the situation in the whole Community, not merely one Member State, and, at the material time, there existed in only three out of fifteen Member States the legal category of registered partnership, assimilated to marriage. Moreover, even Swedish law acknowledged a distinction between the two categories. The two categories did not have the same name, and there were a number of *legal* differences between them, for

[127] Quotation from Bell/ ILGA-Europe, *Equality for lesbians and gay men: a relevant issue in the civil and social dialogue* (ILGA-Europe, Brussels 1998) 12.
[128] Carey, supra n 125, 104.
[129] Also mentioned by Barnard: C Barnard, "The Principle of Equality in the Community Context: *P*, *Grant*, *Kalanke* and *Marschall*: Four Uneasy Bedfellows?" Cambridge Law Journal, Vol. 57, No. 2, 1998, 352, 357.
[130] Carey, supra n 125; Bell, supra n 123.
[131] Joined cases C-122/99 P and C-125/99 P *D*, supra n 2.
[132] Case 59/85 *State of the Netherlands v Ann Florence Reed* [1986] ECR 1283.

example pertaining to the adoption of children. In the Advocate General's phrase, Sweden "did not wish to give two persons of the same sex unqualified access to the legal category of marriage"[133]. Finally, since the Court in *Grant* had found no equivalence between a stable relationship between two persons of the same sex and a stable relationship between two persons of opposite sex, it followed that there was no equivalence, in Community law, between a registered partnership and a marriage[134].

The Court agreed that the concept of a marriage and the concept of a registered partnership were distinct, and dismissed the appeal[135].

D of course pre-dates the Framework Employment Directive, and would undoubtedly be decided differently today. But the same riddle, deriving from *Mangold*[136], may be asked (mutatis mutandis) in relation to *D*, as was previously asked in relation to *Grant*[137].

A counterpoint to *D* is the transsexuality case of *KB*[138]. Here, a female employee of the UK's National Health Service, KB, was concerned that her long-time partner, R, would not be provided for after her death. This was because R was a female-to-male transsexual, and the NHS' pension scheme only provided for a survivor's pension to be payable to a member's surviving *spouse*, where spouse meant solely a person to whom the member had been *married*. Even after his gender reassignment surgery, R was prevented from marrying KB by UK law (as it stood at the material time). During proceedings brought by KB, the Court was asked whether the exclusion of a transsexual partner from the scheme constituted sex discrimination.

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[133] Joined cases C-122/99 P and C-125/99 P *D*, supra n 2, at 4334 (Para. 77 of the Opinion).

[134] As Carey points out, though, the reference to *Grant* here is "not wholly obvious": "Contrary to Grant who was legally single and without specific obligations towards her partner, D is, under Swedish law, obliged to fulfil duties towards his partner akin to those expected of one spouse towards the other.". See Carey, supra n 125, 105.

[135] Contrast the position in Canada, where the Supreme Court of Ontario held that Ontario must extend the definition of "spouse" to *include* same-sex partners: Case of *M.*, as discussed in Mancini and O'Leary, supra n 120, 347. And see now *Maruko* below (text accompanying footnote 147 et seq). For a very interesting discussion of this issue, especially in the cross-border context, see K Boele-Woelki, "The Legal Recognition of Same-Sex Relationships within the European Union" 82 Tul L Rev, 1949.

[136] Case C-144/04 *Mangold*, supra n 2.

[137] See supra, text accompanying n 116.

[138] Case C-117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004] ECR I-541.

Advocate General Ruiz-Jarabo Colomer, reiterating that a survivor's pension constituted pay, recalled that in the 2002 ECHR case of *Goodwin v UK*[139], the European Court of Human Rights had held that the impossibility of a transsexual to marry (that is, to marry a person of the opposite sex to their *post-operative*, or "acquired", sex) was a breach of the right to marry. Returning to KB's case, the UK argued that a male unmarried person and a female unmarried person would fare exactly the same under the pension scheme in question, regardless of transsexuality or sexual orientation. However, the Advocate General took the view that the national rule which outlawed marriage between a transsexual individual, on the one hand, and a person of the opposite sex to their post-operative sex, on the other hand ("transsexual marriage") was contrary to Community law, given that thirteen out of fifteen Member States *did* recognize such marriages, and especially given the judgment in *Goodwin*. Furthermore, this rule denied transsexuals access to a widow's or widower's pension. He concluded:

> *"The Court of Justice must ensure that the exercise of rights protected by the Treaty remains free of any prohibited discrimination and also that those rights are not made conditional on requirements which are contrary to European public policy."*[140]

The impediment to marriage (and therefore the denial of access to the pension) was based on the gender reassignment of the person concerned. This was covered by Article 141 EC[141] following *P v S*. Therefore, it followed that Article 141 EC precluded the national rule which outlawed transsexual marriage.

The Court agreed wholeheartedly with the Advocate General:

> *"Legislation, such as that at issue in the main proceedings, which, in breach of the ECHR, prevents a couple such as K.B. and R. from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other must be regarded as being, in principle, incompatible with the requirements of Article 141 EC."*[142]

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[139] *Christine Goodwin v the United Kingdom*, Application No 28957/95, 11 July 2002.
[140] Case C-117/01 *KB*, supra n 138, at 565 (Para. 75 of the Opinion).
[141] Now Article 157 TFEU.
[142] Case C-117/01 *KB*, supra n 138, para. 34.

Thus, it can be seen how Community law before Directive 2000/78 was prepared to remove the national rule impeding KB, a transsexual, but was not prepared to remove the national rule impeding D, a homosexual[143].

The case of *Goodwin* was also central to a later transsexuality decision: *Richards*[144]. The UK, in response to the censure from the Strasbourg court, had adopted the Gender Recognition Act 2004, by which a post-operative transsexual could have their "acquired" gender officially recognized and taken into account in administrative and legal matters. Unfortunately it did not come into force until 2005, which was too late for Ms Richards. She was a post-operative male-to-female transsexual. Wishing to retire at the age of 60, she applied to the Department of Work and Pensions for a retirement pension. However, because her chromosomal sex was male, and because (pending the coming into force of the new act) there was no way for this to be changed, she was told that she could not have a retirement pension until the age of 65 (the pensionable age for men). She appealed. At second instance, a reference was made to the ECJ.

Advocate General Jacobs noted that Ms Richards was denied her pension in circumstances where she would have been entitled to it had she been registered as a woman at birth, that is, had she been *a person whose identity was not the result of gender reassignment surgery*. This posed a slight problem for the choice of comparator, however. In *P v S*, which would seem to be the obvious precedent for a gender reassignment case, a post-operative male-to-female transsexual was compared to *a man whose identity was not the result of gender reassignment surgery*[145]. If the same comparison was run in Ms Richards' case, Ms Richards would not be found to have been discriminated against. Unlike P, she did not want to be treated the same as a chromosomal man, because, if she were, she would indeed have to wait until the age of 65 for her pension! However, the Advocate General found greater inspiration from the case of *KB*. There, a post-operative *female-to-male* transsexual was compared to *a man*

[143] That is, the rule or framework of rules by which Sweden only allowed persons of the same sex to have registered partners, but denied them access to the legal category of *marriage itself*. See supra Mischo AG's comment in text accompanying n 133.

[144] Case C-423/04 *Sarah Margaret Richards v Secretary of State for Work and Pensions* [2006] ECR I-3585.

[145] To borrow a phrase from Skidmore, P was "compared... with her former self": P Skidmore, "Sex, Gender and Comparators in Employment Discrimination" Industrial Law Journal, Vol. 26, No. 1, March 1997, 51, 59.

whose identity was not the result of gender reassignment surgery. Applying this comparison, mutatis mutandis, to Richards' case, she (a post-operative male-to-female transsexual) would also be compared to someone who possessed her acquired gender, but who possessed it *not as the result of gender reassignment surgery* (that is, in Richards' case, a woman whose chromosomal sex was also female). From such a comparison it would be plainly visible that, while Ms Richards received nothing at 60, the chromosomal woman received her full pension – clearly a case of like treated unlike, and therefore discrimination contrary to EC law.

The Court used almost exactly the same reasoning to achieve exactly the same result. As a consequence of Ms Richards' inability to have her "new"[146] gender recognized, she had been the victim of unequal treatment amounting to discrimination. As in *KB*, a national rule which stood in the way of a Member State worker's fulfilling the necessary requirements to attain a right protected by Community law, was incompatible with EC law and had to be removed.

Returning to sexual orientation, the only case to have been decided by the ECJ *since* the coming into force of the Framework Employment Directive is *Maruko*[147]. Mr Maruko, the surviving same-sex partner of a costume designer, was denied a widower's pension by the body which administered the "Pay scheme for Germany's theatres" ("the scheme"), to which Mr Maruko's late partner had been affiliated. During proceedings brought by Mr Maruko, a reference was made to Luxembourg.

Advocate General Ruiz-Jarabo Colomer first had to decide whether the scheme (and the pension which Mr Maruko was claiming under it) fell within the material scope of the Directive at all. For example, was the pension a matter of social security (in which case it fell outside the Directive's scope by virtue of Article 3(3)), or did it instead constitute "pay" (in which case it fell within the Directive's scope by virtue of Article 3(1)(c))? The test for discerning whether a pension under a given scheme is social security or "pay" is basically whether it is determined more by considerations of social policy (social security), or more by the employment relationship ("pay"). Having considered a number of factors, the Advocate General's conclusion was that this pension was derived from the

[146] The Court's word. Case C-423/04 *Richards,* supra n 144, para. 28.
[147] Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* (ECJ 1 April 2008).

employment relationship (of Mr Maruko's partner), and therefore that it constituted "pay" within the meaning of Article 141 and Directive 2000/78. Turning to the question of marital status, Ruiz-Jarabo Colomer first considered Recital 22 of the Directive, which reads:

> *"This Directive is without prejudice to national laws on marital status and the benefits dependent thereon."*

However, he concluded that Recitals have no binding force, and that, although it is true that the Community has no powers with regard to marital status, Member States had to exercise their competence in a manner which did not infringe Community law. Having reviewed *Grant*, *D* and *KB*, the Advocate General held that the refusal to grant Mr Maruko a pension was not based directly on sexual orientation, but rather on the fact that he was not *married* to his partner. The refusal did however constitute indirect discrimination, because, under German law, only opposite-sex partners could get married, not same-sex partners. In a break with *D*, the Advocate General went on to hold that the legal situation of persons in a registered legal partnership (as Mr Maruko and his partner had been), and the legal situation of spouses, were compatible. Thus, like having been treated unlike, the refusal to grant the pension *was* (indirect) discrimination, on grounds of sexual orientation, contrary to Directive 2000/78, and furthermore was incapable of objective justification.

The Court concurred that the pension was "pay" and therefore that it fell within the scope of the Directive. It also entirely agreed with the Advocate General's dismissal of Recital 22. On the substance, the Court noted that Germany had created for persons of the same sex "a separate regime", the conditions of which had been gradually made "equivalent" to marriage[148]. Having provisionally established comparability[149], the Court had no difficulty in deciding that surviving same-sex partners were being treated less favourably than surviving spouses. Thus, the German legislation concerned was discriminatory on grounds of sexual orientation[150].

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[148] Quotations from ibid., para. 67.

[149] Although note how the ECJ leaves the final word on this to the national court: ibid., para. 72. See also the last sentence of para. 73.

[150] The Court makes a slight change to Ruiz-Jarabo Colomer AG's Opinion here. In its view, the discrimination was *direct*, not indirect. Tobler and Waaldijk make some interesting suggestions as to why this might have been at C Tobler and K Waaldijk, "Annotation *Maruko*" [2009] 46 CMLRev 723. The Court will have another opportunity to consider the matter of civil

4.4.2. A Walzerian analysis

4.4.2.1. Sexual orientation, quintessential boundary conflict: Grant

The ground of sexual orientation really comes down to the debate between those who think that marriage is about the gender of the parties, and those who think that it is more about free choice. Ball sees these two interpretations as "mutually exclusive", and calls the situation a "log jam"[151]. The issue of same-sex unions thus provides a classic example of a dispute, within a community, as to the meaning of a distributed good (a marriage certificate). And it could be argued that, whatever meaning is decided upon, and whatever law is passed, *any* law on this subject would represent a boundary breach: the sphere of power invading the sphere of kinship, which Walzer calls "the deepest understanding of tyranny"[152]. Attempting to present the shared understanding of sovereignty in the form of a list, he notes at point 2:

> *"[The state's] officials cannot control the marriages of their subjects"*[153].

Unsurprisingly, then, complex equality has been largely embraced by those seeking an end to discrimination on grounds of sexual orientation. Indeed, Ball rightly notes another, crucial, boundary breach:

> *"Even if one were to conclude that gay men and lesbians are not entitled to marry because their relationships do not fit within the definition of marriage as determined by our shared traditions, Walzer's theory of justice would prohibit that view from spilling over into other spheres such as that of employment."*[154]

Most of the cases discussed at section 4.4.1. directly concern the employment sphere (and one thinks particularly of *Grant* and *D*), and the others concern it indirectly in any event. Why is society's view of gay marriage being allowed to

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partnerships in Germany, this time in relation to supplementary pension payments, in Case C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg* [2008]OJ C171/15.

[151] Ball, supra n 2552, 502 and 504.

[152] *Spheres of Justice*, supra n 29, 228. Referring to the US of 1983, he notes that homosexual marriage is "legally unrecognized and politically controversial": ibid.

[153] Ibid., 283.

[154] Ball, supra n 2552, 505.

invade this sphere? For example, *Grant* seems to entail the ultimate violation of a shared meaning. It is hard to conceive of any community wherein its understanding of train tickets would include the sexual orientation of the potential passenger, and that of the potential passenger's partner.

It seems appropriate, then, to turn to *Grant* first. In section 3.3. above, it was explained how, if Walzer's theory was not read literally, a free choice or even a characteristic could be considered as a distribuend in a fictional "first" sphere. It is submitted that this is how Ms Grant's homosexuality must be viewed.[155] However, for the purposes of this case, Ms Grant's homosexuality is not just a good; it is a *negatively dominant* good. When Ms Grant arrived in the sphere of office in possession of this negatively dominant good, she was excluded from the distribution and not allocated any travel concessions.[156] The dominant good, being irrelevant to the shared meaning of the travel concessions (see above)[157], was present in the sphere of office *tyrannically*, rendering the distribution *flawed*. Either the European Court or the national court would then likely order the rerunning of the distribution, with Ms Grant's homosexuality taken out of the picture (left, as it were, "at the door" of the sphere). It can thus be seen how a Walzerian analysis of the *Grant* case produces a much better result for Ms Grant, and avoids any need for tortuous comparisons between different types of couple, and different types of partner.

4.4.2.2. Negative dominance, non-stop debate: P v S, KB, Richards

As mentioned in section 2.3., the concept of *negative dominance* is especially important in the case of a suspect ground. This is because, although a litigant *could* be complaining of a boundary breach by the holders of *positively* dominant goods (for example, "the young" in age discrimination cases), it is more common

[155] It does not matter for the purposes of this dissertation whether Ms Grant's homosexuality was chosen by her, or whether it was an innate characteristic. The dissertation does not take a position on the question.

[156] Please note that, just as a positively dominant good can procure for its owner *both* good things *and* the absence of bad things (hard work, for example), so a negatively dominant good can procure for its owner *both* bad things *and* the absence of good things (travel concessions, for example).

[157] One is reluctant to assume a shared meaning, but, as mentioned earlier, it is difficult to imagine that *any* community would include sexual orientation in the definition of travel concessions. It would be open to counsel for South West Trains to argue the contrary, but, for the purposes of this section, it is presumed that any such argument would fail.

that the complainant sees their own minority status (whatever it may be) as a *negatively* dominant good. Good examples from section 4.4.1. include *P v S* and *KB*. Assuming that the distribuend is "continued employment", it seems foolish to refer to the dominant in *P v S* as "not being transsexual"[158]; it is surely more truthful and realistic to refer to the *negative* dominant (possessed by P) of "*being* transsexual". Likewise, in *KB*, where the distribuend is a widow(er)'s pension, it makes more sense to say that the *negative* dominant is, again, "being transsexual" (although in this case referring to the claimant's partner, rather than the claimant themselves). These two cases were resolved happily by the ECJ, and a Walzerian approach would produce the same result, the Court being highly unlikely to be convinced that transsexuality forms any part at all of the shared meanings of employment or pensions.

The situation becomes slightly more rarified when one turns to *Richards*. Here, it was not transsexuality alone which was costing Ms Richards her pension at 60; it was the fact of being a woman whose identity was the result of gender reassignment surgery (as opposed to a woman whose identity was *not* the result of gender reassignment surgery). But if this is made the (negative) dominant, then the distribution can easily be declared flawed, as long as it is held that (in the eyes of the community in question[159]) it makes no difference, for the receipt of a pension at 60, whether the pensioner is chromosomally female or female as a result of surgery.

Richards raises another interesting point. It is highly unlikely that the UK legislature intended to prejudice transsexuals when it declared that women should receive their pensions at 60. It is just that gender reassignment surgery is a newer phenomenon. But this merely underlines the fact that the debate (at which shared meanings are determined) must be *ongoing*[160], and must be accessible by all, including those with "external"[161] ideas or ideas "from outside the… mainstream"[162]. As Rustin points out, it is only in fundamentalist societies "that arguments are only admissible in debate if they are already elements of

[158] And see below, section 4.4.2.3.
[159] Or the Bench, if the alternative theory of mediated complexity is preferred; see below Chapter 8.
[160] See supra, section 2.4., and the quotations there.
[161] M Rustin, "Equality in Post-Modern Times" in Miller and Walzer, supra n 88, 36.
[162] Ibid.

accepted doctrine"[163]. If a contingency that was simply not thought of, or else deemed too remote, at the time of the setting of the original distributive criteria later materializes, or if a circumstance that was not anticipated later occurs, then there must be a facility for reopening the debate and modifying the criteria as appropriate. This may indeed mean "carry[ing] out new surveys every time somebody [comes] up with an objection that might affect […] attitudes in the population"[164].

4.4.2.3. The Tyranny of "Normalcy"

In *P v S*, *KB* and *Richards*, then, it is seen how in claims involving suspect grounds, it is often preferable to regard the case as one of negative dominance. The claimant has taken their characteristic or choice from the sphere to which it was germane to one in which it was, quite literally, not welcome. It is *this* action which flaws the distribution, and causes it to have to be rerun. The alternative is less palatable and could be called: The Tyranny of "Normalcy". There is little doubt that a teacher who was *not* transsexual would have been kept on by S and Cornwall County Council. Likewise, KB would have had no difficulty in acquiring a widower's pension for a partner who was *not* transsexual. And it goes without saying that a British woman whose identity was *not* the result of gender reassignment surgery would receive her pension at 60. Those *without* minority status, what one might call the "normal", appear to be able to take their "normalcy" from sphere to sphere, gathering all the available goods as they go. "Normalcy" here is used somewhat ironically and within quotation marks. It means being standard or being average, where "standard" and "average" are words used to describe someone all of whose characteristics and choices are the characteristics and choices generally possessed or made by the *majority* in the society concerned. The Norm could be seen as setting itself, shifting in accordance with the shifts in the majority's traits and preferences. Alternatively, as Foucault suggested with his "bio-power" thesis, the *State* (borrowing tactics of regulation from what he called "the Disciplines") may be exerting disciplinary, but also *normalizing*, power on the members of society, encouraging them to classify and sort themselves, so as to move ever closer to the Norm. In such a

[163] Ibid.
[164] J Elster, "The Empirical Study of Justice" in Miller and Walzer, supra n 88, 92.

programme of mass homogenization, (State-sanctioned) "normalcy" would take on a much more significant role; it would be very much the *goal* of the members of the community, with the law complicit as a mere *legitimation* of the other powers.[165]

But whether self-created or imposed (or perhaps a bit of both), "normalcy" cannot be ruled out as a dominant good. It could even be regarded as having its own sphere. However, it is a sprawling sphere, very much "out of control" and in need of robust boundary revision. "Normalcy" is constantly looking to colonize the spheres around it, cajoling and bullying, tempting other spheres to give up their autonomy and join it[166], or else simply grabbing them outright. The "normal" also very much favour the Aristotelian test for equality, since they are the Guardians of "Likeness": they decide what (or who) is like, but also, more importantly, what (or who) is *unlike*.[167]

However, "normalcy" moves about insidiously and has a chameleon-like nature; it can, by definition, fit in anywhere, so that its secret dominance goes practically unnoticed. In any given distribution, it would be difficult to define exactly what it was at that precise moment, and therefore to know which, if any, distributee possessed it. Likewise it would be difficult to know which characteristics he or she would have to leave "at the door" in order to make the distribution more just. Thus the use of negative dominance would still seem to be the best approach (from the Walzerian point of view) for cases involving minority statuses. There is no knock-out blow, then, or perhaps that should be *iron boundary*, to defeat the

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[165] "The norm has a very different epistemological structure [to law]: it is supposed to be experimental; it keeps to the facts whose differences, divergencies and hierarchies it privileges. It multiplies inequalities and brings them out wherever it takes hold: inequalities in face of death, in face of sickness and knowledge etc. It… "unequalizes", because it is set up on the basis of its capacity to locate the most minimal disparities": F Ewald, "Justice, Equality, Judgement: On "Social Justice"" in G Teubner (ed), *Juridification of Social Spheres* (de Gruyter, Berlin 1987) 107.

[166] Foucault's "bio-power" operates (reflexively) in the same way. No one wants to be the one who does not fit in, and this much-feared consequence of resistance pushes everyone on to conform even more.

[167] "[A] society which perceives heterosexuality as the commonly prevailing normal sexual behaviour [...] which others should be compared to and should aspire to assimilate into, might sanction whoever fails to do so by approving of discrimination against that individual.": Canor, supra n 117, 277. "[D]oes the equal misery approach ensure that those outside the club of normality are to remain there but, while outside, are to be treated equally *inter se*? Following this approach equality fast becomes a means of protecting normality. Normality, in turn, becomes a vicious circle wherein only those who define its parameters are included [telling those who are excluded to...] fit in as we do or else do not bother complaining that it is cold outside": Carey, supra n 125, 103 (Carey's italics).

tyranny of a ubiquitous but ever-mutable "normalcy". Instead it must be fought indirectly, case by case.

Nevertheless, the Tyranny of "Normalcy" remains an interesting topic. It would be naïve to deny that county councils, national health services and secretaries of state (in other words, *distributors*) all have some kind of "Norm" in their minds when they distribute.[168] And Foucault may well be right that normalizing powers (and therefore the Norm itself) are "institutionalized… by legal instruments"[169] (the Births and Deaths Registration Act 1953 in *Richards*, for example). To take one of the other Article 19 grounds, disability, it is often the case that Health and Safety laws hamper the progress of the disabled, thus *reinforcing* the dominance of "Normalcy". The Tyranny of "Normalcy" will be returned to later.

4.4.2.4. Distinctly identical: D and Maruko

Finally, *D* and *Maruko* provide a neat example of the absurdity of the Aristotelian approach to equality cases, and the relative wisdom of Walzer's. In *D*, a registered (same-sex) partnership was treated as "unlike" a marriage, but seven years later in *Maruko*, a registered (same-sex) partnership was treated, at least pending the national court's confirmation, as "like" a marriage. If a traditional comparative approach is insisted upon, it is as a minimum to be hoped that the same comparison could be run in the same way twice, ceteris paribus, so that the Aristotelian rule could at least be seen to obey itself. *D* and *Maruko* provide proof positive, if proof were needed, that the outcome of equality cases is as likely to be influenced by politics and opportunism as it is by logic or law. The fact that the Framework Employment Directive was not implemented in 2001, and that D could thus only rely on the general principle of equal treatment, and that therefore it fell to the Court alone, without Member State backing, to declare the identity of same-sex partnerships and marriages, undoubtedly explains the Council's victory in *D*: the political stakes were simply too high for the judges at the ECJ, and their nerve failed. However, the fact that the Framework Employment Directive *was* implemented in 2008, and that Mr Maruko *could* rely

[168] That is why it is essential that *all* members of the community, distributors *and* distributees, are present at the debate at which the distributive criteria are ascertained.
[169] A Barron, "Foucault and Law" in Penner, Schiff and Nobles (eds), *Introduction to Legal Theory and Jurisprudence* (Butterworths, London 2002) 994.

on it without recourse to the general principle, and that the Court *could* thus find for him while leaving the *legislature* to bear any responsibility, similarly explains the claimant's victory in *Maruko*. It is not the political u-turn in this story which is sad; political u-turns happen every day, and the second result is indisputably better than the first. What is sad is the way the Aristotelian test can be so obviously moulded to produce the needed result. Either two things are alike or they are not; the mere happenstance of which remedy may or may not be available on the day of the comparison cannot possibly affect this.[170]

Looking at the two cases from the Walzerian point of view, the two distribuends at issue are obviously a household allowance (in *D*) and a survivor's pension (in *Maruko*). In both cases the dominant would appear to be the same: the status of being *married*, that is, that the tie between any claimant and their partner (or late partner) was one of *marriage*. Thus there was a boundary breach in both cases, unless counsel for the Council, or for the German Theatre Pension Institution, could convince the Court that the status of being *married* (in the sense of a union between two heterosexuals) was part of the shared understandings of household allowances or survivor's pensions in the communities concerned: Germany in *Maruko*, and the whole of the EU (or perhaps just the workforce of the Council) in *D*. Debates held in these two communities would reveal the shared understandings; a summary of the relevant debate and its outcome could easily be presented by counsel, calling witnesses if necessary, always with the possibility for opposing counsel to cross-examine. Opposing counsel could also make their own presentation and call their own witnesses. It would fall to the Bench to make the final decision, and then to declare whether the distribution under consideration was flawed or not.

The results in the two cases cannot be predicted. Nor can it be predicted whether the result in *Maruko* would be different from that in *D*, or the same. If, as the Court hinted, there was indeed some kind of change of view in Europe,

[170] Opponents of judicial activism might argue that the Court was right to wait for the Framework Employment Directive to be implemented before pronouncing on gay marriages, and that therefore there was a substantive difference between 2001 and 2008: agreement between the Member States as to the undesirability of discrimination on the grounds of sexual orientation. But this would be a nonsense. The Framework Employment Directive still *existed* in 2001 (even if not on the date of D's application). Any "agreement" relied upon in 2008 could have been just as easily relied upon (if tacitly) in 2001. And what exactly is the point of the general principle if not to allow the Court to correct any inequalities which it may encounter in the course of hearing a case?

with regard to gay marriage, between 2001 and 2008, this would be reflected in the result. If not, this would similarly be reflected in the result. D's own community, and Mr Maruko's own community, would thus bear the true responsibility for deciding whether, in their respective cases, a registered partnership was or was not the same as a (heterosexual) marriage.[171] The Court would not have to fear making an unpopular decision, because the decision would, ultimately, be that of the populace itself.

4.5. Disability

4.5.1. The ECJ's case-law

Disability is perhaps the most complex of the Article 19 grounds, not least because of the many definitional complications which the word "disability" presents. On one view, disability discrimination is entirely "a function of the social reception" of the disabled person, and nothing whatsoever to do with "the functional state of [his or her] body or mind"[172]. In other words, it is an *ascribed* difference (to use the first of Schiek's three categories[173]), based only on the reactions and opinions of others. The person to whom the ascription is applied may not consider themselves "disabled", or different, at all. In a recent study into happiness, published in *The Lancet*, children with cerebral palsy were found to be as happy as those not suffering from this condition. Professor Allan Colver, who led the research, commented:

> *"for the person with cerebral palsy – that's who they are, and as they grow up and develop their sense of self, that disability is indistinguishable from their identity as human beings."*[174]

Bell has summed up the problem which this poses in the legal context:

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[171] And of course it would be open to all counsel to make provision, in their pleadings, for the possibility of their side losing on the question of the shared meaning; they could request that, in that eventuality, the Bench apply the "override" (discussed above, for example, at section 2.6.) in order to mitigate any resultant injustice. The Court would no doubt want this request, like any other request, to be fully reasoned. And it would almost certainly demand that counsel produce very strong and compelling grounds, before it would consider overriding the duly ascertained wishes of the distributive community.

[172] Quotations from JE Bickenbach, "Disability and Equality" (2003) 2 J.L. & Equal. 7, 8.

[173] See supra n 16.

[174] D Lawson, "From Pentecost island to modern Britain, the futility of trying to measure happiness" *The Independent* (London 6 July 2007) 33.

> *"The meaning of "disability" is contested and gaps emerge between self-perception and external categorizations. The definition of disability for the purposes of discrimination law may not correspond to an individual's assessment of whether they have a disability."*[175]

The Framework Employment Directive has tried to skirt round this problem by eschewing a definition of "disability" altogether. However, while the absence of a definition should have permitted judges to adopt the "greatest range" of possible meanings when construing the word[176], in fact the ECJ opted for a very narrow understanding of "disability" in the first preliminary reference on the subject. In *Chacón Navas*[177], the issue was whether mere "sickness" was covered by the prohibition of discrimination on grounds of disability in Article 1 of the Directive. The Court answered this in the negative. Quinn has described the decision as "disappointing to say the least"[178] and "an aberration"[179]. Meenan has commented that "[i]t would be a pity if *Chacón Navas* was to remain the final word… on the issue of definition"[180].

The second preliminary reference tackled by the Court on disability was the case of *Coleman v Attridge Law*[181]. This again concerned the scope of the Directive, this time whether it covered what is sometimes called "associative discrimination", also known as "transferred discrimination"[182]. This is the phenomenon whereby the complainant has suffered discrimination not as a result of their *own* disability, but as a result of a third party's. Ms Coleman was working for a firm of solicitors when, in 2002, she gave birth to a son who was disabled. She alleged that, inter alia, when she sought to take time off to care for her son she was called "lazy", and she was also denied the same flexibility as regards her working arrangement as was granted to her colleagues with non-disabled children. She sued for constructive dismissal, and the South London Employment Tribunal made a reference.

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[175] Supra n 4, 197.
[176] The quotation is from Hosking, "Great Expectations: Protection from discrimination because of disability in Community law" EL Rev 2006, 31(5), 667, 681.
[177] Case C-13/05 *Sonia Chacón Navas v Eurest Colectividades SA* [2006] ECR I-6467.
[178] Quinn, supra n 88, 274.
[179] Ibid., 277.
[180] Meenan, supra n 13, 348.
[181] Case C-303/06 *S. Coleman v Attridge Law and Steve Law* (ECJ 17 July 2008).
[182] See for example Pilgerstorfer and Forshaw, "Transferred discrimination in European law" 37 Indus. L.J. 384.

Advocate General Poiares Maduro was clear that the Directive could indeed be applied to discrimination by association:

> *"[T]he Directive does not allow the hostility an employer may have against people belonging to the enumerated suspect classifications to function as the basis for any kind of less favourable treatment in the context of employment and occupation… The Directive does not come into play only when the claimant is disabled herself but every time there is an instance of less favourable treatment because of disability."*[183]

The Court followed this argument:

> *"Although, in a situation such as that in the present case, the person who is subject to direct discrimination on grounds of disability is not herself disabled, the fact remains that it is the disability which […] is the ground for the less favourable treatment […]. […] Directive 2000/78, which seeks to combat all forms of discrimination on grounds of disability in the field of employment and occupation, applies not to a particular category of person but by reference to the grounds mentioned in Article 1."*[184]

If the Directive applied only to those *having* the characteristic classified as suspect, and not to those *associated with them*, then, according to the Court, it would be "deprive[d]… of an important element of its effectiveness"[185]. Unlike in *Chacón Navas*, then, the Court in *Coleman* opted for a *wide* interpretation of the scope of the Directive (albeit the scope *rationae personae*, not *rationae materiae*).[186]

4.5.2. A Walzerian analysis

Given the paucity of cases concerning disability, there is not much which a Walzerian analysis can add to the existing situation. In *Chacón Navas,* the Court decided against allowing sickness either to form part of one of the original grounds in the Framework Employment Directive (specifically disability), or to be a ground in its own right. Thus, the comparison (between a sick employee and a healthy one) was never run.[187] Since complex equality is only being mooted in

[183] Case C-303/06 *Coleman,* supra n 181, at Paras. 22-23 of the Opinion (emphasis added).
[184] Ibid., para. 50.
[185] Ibid., para. 51.
[186] For an interesting note on the case, see L Waddington, "Annotation *Coleman*" [2009] 46 CMLRev 665.
[187] It is not exactly clear why the Court only mentioned the general principle (at Judgment, para. 56), but did not actually make use of it; so far as can be seen the case falls within the scope of Community law. One explanation is that this course of action was not alluded to by the national

this dissertation as a *complement to traditional comparison* within court cases at the ECJ[188], there is no need to consider Ms Chacón Navas' case from the Walzerian angle either.

Coleman, meanwhile, offers a nice chance to review some of the features of the Walzerian approach already encountered in the earlier analyses. While a number of things were being distributed by Mr Law to Ms Coleman, they could perhaps all be summed up in a single idea: flexibility. Ms Coleman lost out in the distribution of flexibility owing to a characteristic (albeit of her child) which acted as a *negative dominant*, potentially rendering the distribution defective[189]. First, though, the Court would have to decide whether having a disabled child formed any part of the shared meaning of flexibility in Ms Coleman's community. Assuming that it decided that it did *not*, the distribution would be declared defective, and a rerun ordered[190]. This time Ms Coleman would receive her share of flexibility (of working arrangements, hours, and so on) on the same terms as workers with non-disabled children. But a painstaking dissection of the ways in which they might be different from her, and she from them, would be unnecessary.

4.6. Afterword

court in its questions. However, that should not have stopped the Court from raising the matter *propio motu*.

[188] Not as some kind of all-embracing programme for societal reform. Of course a trickle-down effect, from the Court to the wider world, cannot be ruled out, and is even to be expected, where distribution is concerned.

[189] Note how, once again, it would be possible to view this case the other way around, so that workers with *non-disabled* children would be the ones responsible for the boundary conflict, via their (tyrannical) possession of a *positively dominant* good. In this alternative scenario one can detect, again, the operation of the Tyranny of "Normalcy".

[190] In the Forum, Ms Coleman would presumably argue that flexibility, as applied to an employee, meant the ability to vary one's working arrangements to take account – within reasonable limits – of certain other circumstances, including personal circumstances. Mr Law on the other hand might argue that it meant the same thing, but with the caveat, "such ability only being enjoyable by parents of non-disabled children". It is hard to see how he could make this argument at all, let alone in a convincing enough manner to attract a majority of votes (or whatever else the chosen system for electing the winning meaning required). However, even if he had succeeded in this argument in the Forum, counsel for Ms Coleman could invoke the Override before the Court, asserting that this meaning infringed Article 14 and Protocol No 12 of the European Convention (at the very least). Alternatively, the choice of meanings itself could be left to the Bench via the alternative theory of Mediated Complexity, for which see below Chapter 8.

On 2 July 2008, the Commission made its proposal for a so-called "horizontal" Directive for the four grounds covered by the Framework Employment Directive, which would expand the prohibition on discrimination on those grounds to cover social protection (including social security and healthcare), social advantages, education, and access to and supply of goods and services which are commercially available to the public (including housing)[191].

This means, for example, that if a female student in an EU Member State were to bring an action against her University for forbidding her to wear an Islamic headscarf, as Leyla Şahin did in the ECHR case of *Şahin v Turkey*[192], she could rely on EU secondary legislation, in a way that she could not at the moment (although it is by no means clear that she would win, as there are, as the proposal stands, a number of exceptions concerning religion and belief).

[191] See Commission (EC), "Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation" COM(2008)426 final, 2 July 2008. On 2 April 2009, the European Parliament adopted by 363 votes to 226, with 12 abstentions, a legislative resolution making significant amendments to the proposal.

[192] *Leyla Şahin v. Turkey*, Application No. 44774/98, 10 November 2005.

5. Nationality Discrimination

5.1. Introduction

Nationality has been described as the legal bond between a person and a State[1]. The operative word here is "legal". Unlike gender, race, or any of the other grounds of discrimination so far considered, a person's nationality comes into existence by operation of law, and can sometimes even cease to exist by operation of law.[2] This legal dimension greatly affects how society views inequality grounded on nationality.

While discrimination in matters relating to nationality should certainly be, if at all possible, "avoid[ed]"[3], and while discriminating against others on grounds of nationality (or supposed nationality) has certainly led to unfairness and even great hardship on occasion[4], the fact remains that where a *legal* relationship is concerned, it makes no sense, from a purely legal point of view, and in the normal course of events, to treat those between whom the relationship pertains in exactly the same way as those between whom the relationship does not pertain, at least vis-à-vis the matters *with which the relationship is concerned*. To act in any other way would be to render the relationship redundant; it would no longer serve any purpose. Entering into a relationship creates rights among the parties in which those outside the relationship simply cannot share; the creation of exclusive rights is the whole point of the exercise. One could draw an analogy (although not a perfect one) with the doctrine (in English law) of privity of contract. An individual who is not a party to a contract cannot derive rights thereunder. He is a *stranger* to the contract. The exclusion of the stranger is not only not unlawful, it is (in contract law) mandatory. Similarly, the

[1] European Convention on Nationality, Article 2(a). There are of course other, non-legal senses of the term.
[2] In the European Union, possession or otherwise of nationality is a matter for *national* law, *not* EU law. See the Declaration on Nationality of a Member State, appended to the Treaty of Maastricht: [1992] OJ C191/98.
[3] European Convention on Nationality, 5th recital to Preamble.
[4] For example, the expulsion of Germans and Hungarians from Czechoslovakia after World War II; the detainment and internment of large numbers of Japanese Americans in the wake of Japan's attack on Pearl Harbour.

foreigner[5] should not be surprised to find himself excluded from a number of the bargains struck between the nationals of the State he is visiting, and the State itself. He is simply not privy to them.

However, the creation of the European Union puts a different complexion on things. It is an entity *sui generis*, establishing, as the ECJ famously declared in the *Van Gend & Loos* case, a "new legal order"[6], bringing with it new legal relationships not supplanting, but supplementing existing ones. In Walzerian terms, this can in some cases mean the co-existence of two, mutually inclusive, distributive communities – a micro sphere within a macro sphere. The stranger may now only be a stranger at the micro level; at the macro level he is a friend, a fellow distributee of certain rights and obligations, a co-contractor. His claim to equal treatment is not just stronger now, it is *insuperable*. But this dual (legal) personality is often stifled by Member States, and the EU's split-level decision-making, and double context, is misunderstood or ignored, as will be seen.[7]

5.2. Nationality discrimination in EU law

Discrimination on the grounds of nationality is prohibited by Article 12 of the Treaty of Rome, now Article 18 TFEU, although the prohibition is reiterated (sometimes only implicitly) on several occasions thereafter, perhaps most noticeably in the provisions setting out the free movement of persons[8], establishment[9] and services[10], and in a number of pieces of secondary legislation.[11] This is because the outlawing of discrimination on grounds of

[5] Étranger in French, extranjero in Spanish.
[6] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1, at Part IIB of the grounds.
[7] Walzer is perfectly comfortable with the idea of individuals living in spheres-within-spheres, and thus owing, as it were, a double allegiance. See his description of what he calls multinational empires in M Walzer, *On Toleration* (Yale University Press, New Haven 1997) 14-19. The mere fact that the inner sphere's inhabitants were – in some respects, anyway - governed from without rather than from within does not breach complex equality.
[8] See Article 39(2) EC – now, since the coming into force of the Treaty of Lisbon, Article 45(2) TFEU.
[9] See Article 43 EC, second paragraph – now, since the coming into force of the Treaty of Lisbon, Article 49 TFEU, second paragraph.
[10] See Article 50 EC – now, since the coming into force of the Treaty of Lisbon, Article 57 TFEU.
[11] This means nationality of an EC Member State, though. Third country nationals, subject to one or two exceptions, are excluded. The ECJ has made it clear that the principle of non-discrimination on grounds of nationality may not be invoked where non-member countries are

nationality lies at the heart of the internal market project. As Van der Mei has put it,

> *"Nationality requirements are by their very nature at odds with the objectives of the Community. The common market could never have been realised, and could never operate effectively, if Member States were free to exclude nationals of other Member States from their territory and labour markets."*[12]

In the field of free movement, the Court of Justice has heard countless cases involving nationality requirements, actual or constructive, most of which boil down to a dissonance between the treatment of a person or entity national to the so-called "host" State and the treatment of a person or entity entering the host State from another Member State (the "home" State), or indeed from a third country. Where discrimination on the grounds of nationality is alleged, the Court uses Aristotelian reasoning in making its finding, with the same unsatisfactory results seen earlier in relation to the other grounds.

In *Angonese*[13], for example, the Court faced its perennial problem of identifying the right comparators. In this well-known case, an Italian man was banned from applying for a job at a bank in the Bolzano region of Italy, on the grounds that he did not hold a certain certificate, awarded on the successful completion of an exam and known as the *patentino*, attesting his fluency in German; the fact that he was fully bilingual, having learnt German by other means, made no difference. The *patentino* being a local qualification, many other Italians, in other parts of the country, would have been similarly turned down, making the case, according to some, one of residency discrimination and not nationality discrimination; the correct comparators would therefore have been a resident of Bolzano and a non-resident of Bolzano. However, the Court held the bank's condition to be discriminatory on grounds of nationality, preferring to compare residents of Bolzano with *non-Italians*. Davies regards *Angonese* as further proof of the Court's "shaky grasp of who should be compared with who"[14], his

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at issue, for example, Case 52/81 *Offene Handelsgesellschaft in Firma Werner Faust v Commission of the European Communities* [1982] ECR 3745.

[12] A Pieter van der Mei, *Free Movement of Persons within the European Community* (Hart Publishing, Oxford 2003) 70.

[13] Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA.* [2000] ECR I-4139.

[14] G Davies, ""Any Place I Hang My Hat?" or: Residence is the New Nationality" 2005 European Law Journal 11:1 (Jan) 43, 46. A Walzerian inquiry would reveal, almost definitely, that part of the meaning of a job at a bank in the German-speaking region of Italy – or at least the

principal example being a case about free entry for local children and OAP's into the museums of Florence: *Commission v Italian Republic*[15]. Again, in holding that there had been nationality discrimination, the Court ran a comparison between the resident and the foreigner, rather than between the resident and the non-resident; Davies calls this "logically regrettable"[16].

However, even after the comparators are selected, the Court still struggles with the question of whether two people or things are like or unlike, and whether their treatment was like or unlike. In another case concerning a regional requirement, this time in the context of the free movement of *goods*, *Walloon Waste*[17], it was necessary to compare waste produced in Wallonia with imported waste (as the Walloon Regional Executive wished to treat these two things in an unlike fashion). As Wilsher has explained, the outcome of the comparison depends entirely on whether the observer used a market equivalence method, or a regulatory equivalence method.[18] From the point of view of market equivalence, the two types of waste are of course alike. But from the point of view of regulatory equivalence, waste produced at home and imported waste are different; the environmental policy pursued by the Executive – in keeping with the principle that waste should be disposed of as close as possible to its source – is satisfied by the first but not by the second, making them (in the eyes of a regulator) *unlike*.[19]

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opportunity thereof – was *the need to be bilingual*, *not* "possession of the patentino" (although of course the latter is *one of* the ways of satisfying the former). As things stood, the patentino was an architypal dominant – those possessing it gained automatic and exclusive access to other goods, while those without it were turned away. Although this Walzerian analysis reaches the same result as the Aristotelian one (a breach of the equality principle), it can be seen that the first is *much* easier than the second. It avoids both the problem of choosing comparators (job-applicants from two different regions of Italy, or job-applicants from two different Member States), and the problem of one of the comparators' needing to be hypothetical.

[15] Case C-388/01 *Commission v Italy* [2001] ECR I-721.

[16] Supra n 14, 49.

[17] Case C-2/90 *European Commission v Belgium* [1992] ECR I-4431.

[18] Daniel Wilsher, "Does *Keck* discrimination make any sense? An assessment of the non-discrimination principle within the European single market" ELRev 2008, 33(1), 3, 7.

[19] In the event, the Court mixed the two approaches by finding discrimination, only to justify it, controversially, on grounds of imperative requirements of environmental protection. A Walzerian approach would have quickly distilled the case down to its essential question: in the business of waste-treatment, is the distance that waste has travelled a pertinent factor (in which case the breach of the border between the sphere of nationality and the sphere of waste-management is legitimate), or an extraneous factor (in which case it is illigitimate)? Guessing, for the sake of argument, that it is a pertinent factor (in accordance with the principle mentioned in the main text), then Belgium should have won the case outright. Awkward – even absurd – questions about whether two lots of waste are like or unlike are avoided, as, for the

The tax case of *Gilly*[20] also presented difficulties at the stage of the like-for-like analysis. Here, a woman who lived on the Franco-German border, on the French side, who taught in a German state school, and who was of dual (French and German) nationality, found herself taxed in Germany, pursuant to a Franco-German Double Taxation Convention. Although married, her non-residence in Germany meant that she could not benefit from a so-called "splitting system", in accordance with German federal income tax laws; this meant that she was treated as though she were single, with the result that she had to pay more tax in Germany than she would have had to had she been taxed in France, or than she would have had to had she been *resident in Germany*. The Court examined the rationale for the German federal income tax laws. This was that non-residents usually have some other source of income, where they actually live, and the income received in the State where they are *not* resident is just a *part* of their total income, while, where the State is taxing a *resident*, they take the view that this is all of or the main, concentrated part of the taxpayer's total income.[21] Accepting this rationale, the Court refused to find discrimination as between a person living in Germany and paying tax in Germany, and a person living in France and paying tax in Germany.[22]

However, as Vanistendael[23] has noted, Mrs Gilly's being treated as a single person is highly discriminatory, and the rationale was flawed: clearly her teacher's salary, in Germany, was the main part of (if not all of) her total income. As usual, Aristotle can be used to condone, perpetuate and, in some ways, further legitimize an existing (unfair) distinction. The German federal income tax laws said (wrongly) that the non-resident and the resident were unlike, and the ECJ simply grafted Mrs Gilly's case on top of this pre-existent, and unsound, analysis – treating the unlike in unlike fashion could not be discrimination. Rather, the resident and the non-resident (or the taxpayer with German

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record, are obscure and impenetrable legal riddles such as whether direct discrimination can or cannot be objectively justified.

[20] Case C-336/96 *Mr and Mrs Robert Gilly v Directeur des services fiscaux du Bas-Rhin* [1998] ECR I-2793.

[21] Ibid., para. 49.

[22] Ibid., para. 50.

[23] F Vanistendael, "Annotation *Gilly*" (2000) CMLRev 167.

nationality and the taxpayer with dual Franco-German nationality) should have been treated as *like*, making their unlike treatment unjustified discrimination.[24]

These examples hopefully illustrate that the ECJ's reliance on the Aristotelian test for equality has been as problematic in the field of nationality discrimination as it has been in the other fields so far considered. Using a sample of cases, this chapter attempts to ascertain if and to what extent a Walzerian analysis would improve matters.

5.3. A specific example: the free movement of persons

As was mentioned in Chapter 2, Walzer holds equal citizenship to be an essential prerequisite for the establishment of complex equality[25]. It is crucial that every member of the distributive community should have a fair and equal chance to participate in the forum, which means that even the most recent newcomer must be granted full political rights: "every immigrant and every resident is a citizen, too"[26]. It is obvious that the existence of a second-class citizenry, such as the *metics* in ancient Greece, as described by Walzer in his chapter on "Membership"[27], would pose a serious problem for the complex egalitarian.

In the US, there exists such an underclass, whose members are known as "resident aliens". Linda Bosniak, for one, has applied Walzer's theory to the

[24] A Walzerian approach would have allowed the Court to face the real question, which was whether non-residency and/or non-nationality were pertinent factors for Germany to take into account when distributing the more lenient tax demands. It soon becomes clear that the correct badge to be shown at the entrance to this particular distributive sphere was *receipt of all or nearly all one's income in Germany*: *that* was the only legitimate dominant. Any other badges (residency in Germany, German nationality) would have to be left at the door. By focusing on the good and its meaning, Walzer cuts through the assumptions being made that (say) non-residence in a state somehow equates to a smaller contribution being made to that state's exchequer. For another example of the Court's difficulties with the like-for-like stage, see the analysis and discussion of *Vigier* below, section 5.4.2.: Case 70/80 *Tamara Vigier v Bundesversicherungsanstalt für Angestellte* [1981] ECR 229.

[25] Supra section 2.5.

[26] M Walzer, *Spheres of Justice – A Defense of Pluralism and Equality* (Basic Books, New York 1983) 52 (hereinafter referred to as *Spheres of Justice*). See also Walzer's later remark, "Participants in economy and law, [guests] ought to be able to regard themselves as potential or future participants in politics as well": ibid., 60.

[27] See the discussion at ibid., 53-5.

problem of resident aliens, with some degree of success[28]. She draws on cases where the US courts have attempted to ascertain which, if any, rights, enjoyed by nationals, may be lawfully withheld from aliens. She then uses the concept of sphere-separability to explain why some denials of rights by States were held to be (or should have been held to be) impermissible. For example, in the *Graham* case, the Supreme Court found that the denial of certain State benefits to resident aliens of foreign origin was akin to denying them a right to reside in the first place, in other words, it was an invasion, by the sphere of welfare benefits (a State concern), of the sphere of membership (a Federal concern)[29]. Such decisions, and the tensions between State competence and Federal competence which they sometimes reveal, are very helpful when one comes to consider the ECJ's case-law on the free movement of persons.

Over the many years that it has been hearing cases on the subject, the ECJ has faced a plethora of distribuends: educational grants[30], childbirth loans[31], rail fare reduction cards[32], places on training courses[33], and so on. The question was, could a Member State vary the way it distributed these things according to whether it was confronted with one of its own nationals, or with a national of another Member State exercising their right of free movement (or even a member of the latter's family)? Or did it have to treat both categories of person in the same way? The Court declared in the majority of cases that equal treatment of national and migrant was required; what was good for the host State goose was good for the home State gander. This idea can be plainly seen in a number of the early judgments, for example:

> *"If the widow and infant children of a national of the Member State in question are entitled to such cards provided that the request had been made by the father before his death, the same must apply where the*

[28] See L Bosniak, *The citizen and the alien: dilemmas of contemporary membership* (Princeton University Press, Princeton, NJ 2006).
[29] John O Graham, Commissioner, Department of Public Welfare, State of Arizona, Appellant, v Carmen Richardson, Etc.; William P Sailer et al., Appellants, v Elsie Mary Jane Leger and Beryl Jervis: 403 US 365, 91 S Ct 1848.
[30] Case 76/72 *Michel S. v Fonds national de reclassement social des handicapés* [1973] ECR 457.
[31] Case 65/81 *Francesco Reina and Letizia Reina v Landeskreditbank Baden-Württemberg* [1982] ECR 33.
[32] Case 32/75 *Anita Cristini v Société nationale des chemins de fer français* [1975] ECR 1085.
[33] Case 152/82 *Sandro Forcheri and his wife Marisa Forcheri, née Marino, v Belgian State and asbl Institut Supérieur de Sciences Humaines Appliquées - Ecole Ouvrière Supérieure* [1983] ECR 2323.

> *deceased father was a migrant worker and a national of another Member State."*[34]

And:

> *"[T]o require of a national of another Member State lawfully established in the first Member State an enrolment fee which is not required of its own nationals […] constitutes discrimination by reason of nationality".*[35]

These sweeping, Aristotelian statements, insisting that Member States could not act towards nationals from other Member States differently to the way they acted towards their own nationals, in other words, that likes must be treated alike, conveyed in a way that did not draw too much attention to itself the fundamental axiom: that *migrants and nationals were like*. The Aristotelian test's knack for cloaking a hidden message, and the ease with which it could be used as a rubber stamp for a foregone conclusion[36], were very much on display in these cases. Even where the Court did wish to find for the Member State, in most cases[37] it did this by declaring whatever the migrant or his family member were seeking to be outside the scope of Community (primary or secondary) law.[38] This reasoning also, at least partially, cloaked a difficult issue: the division of competences between the EEC (as it then was) and the Member States. But the message was clear enough. Migrants and nationals *could* be regarded as unlike when the matter under consideration was Member State competence, but as soon as the matter under consideration became Community competence, the two groups were to be regarded, almost without fail, as indistinguishable[39].

The Aristotelian test is a blunt instrument at the best of times, but using it in this fettered way renders the results even less convincing. Above all, the sneaking suspicion that the Court's decisions are entirely political, and that Aristotle is merely being used as so much whitewash, is raised throughout this case-law.

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[34] Case 32/75 *Cristini*, supra n 32, para. 15.
[35] Case 152/82 *Forcheri*, supra n 33, para. 18.
[36] See section 9.1. below.
[37] But not all. See the discussion of Case 336/96 *Gilly*, supra text accompanying n 20.
[38] Or occasionally even *national* law eg Case 70/80 *Vigier*, supra n 24.
[39] If a Member State did want to plead some difference (as between its own citizens and newcomers), it could only do this, it seemed, at the stage of objective justification, and even then with little chance of success, eg Case 237/78 *Caisse régionale d'assurance maladie de Lille (CRAM) v Diamante Palermo, née Toia* [1979] ECR 2645; Case C-147/03 *Commission v Republic of Austria* [2005] ECR I-5969. Somek has called this phenomenon "the proportionalisation of difference": A Somek, "Solidarity Decomposed: Being and Time in European Citizenship" 2007 ELRev 32(6), 787, 816.

5.4. Taking a Walzerian approach

5.4.1. The early case-law

As before, Walzer's method allows for a much more subtle and contextual analysis of any given case. That said, when one looks at the very earliest cases, the outcomes arrived at via a Walzerian analysis are not notably different from those which the Court itself arrived at via the Aristotelian test. To take an example, in the *Frilli* case[40], Belgium sought to deny Ms Frilli, an Italian national, its guaranteed income for old people. The ECJ found this to be discrimination on grounds of nationality, and held that Ms Frilli must receive the benefit. A complex egalitarian would wonder whether Ms Frilli's "being Italian", or "alienage" to use Bosniak's word, constituted a negative dominant disqualifying her from the distribution of this particular benefit, or indeed whether (elderly) Belgian citizens' "citizen status" acted as a *positive* dominant for *them*. While, as usual, no definitive answer could be given until the distributive community concerned had stipulated what its shared understanding of a "guaranteed income for old people" was, it is possible to state, provisionally, that Ms Frilli *should* receive the benefit, unless "being Belgian" was in some way part of said understanding. A guaranteed income for old people, at least on the face of things, is not about being Belgian, but about being old.[41]

This seeming agreement between the judge who finds the differential treatment of national and migrant to be discriminatory, and the complex egalitarian who discerns the exertion of dominance[42] in the non-distribution of the benefit concerned to the migrant, recurs often in the case-law. The unlikelihood of "being French" forming part of the shared meaning of an allowance for handicapped adults[43], a rail fare reduction card[44], or an allowance for women

[40] Case 1/72 *Rita Frilli v Belgian State* [1972] ECR 457.
[41] Of course, the distributive community could respond that only those old people who had contributed to this benefit by paying their Belgian taxes should receive it. However, this would be not so much a nationality requirement as a residence requirement (for which, see the next paragraph). This touches on the difficult issue of *solidarity*, discussed further below at 5.5.
[42] Or the imposition of negative dominance.
[43] Case 63/76 *Vito Inzirillo v Caisse d'allocations familiales de l'arrondissement de Lyon* [1976] ECR 2057.
[44] Case 32/75 *Cristini*, supra n 32.

with children[45], or of "being Belgian" forming part of the shared meaning of an old age pension[46] or a special unemployment benefit for young workers[47], means that the host States' inclusion of these attributes in their distributive criteria represents a boundary breach, causing the resultant distributions to be flawed. The same applies to various forms of residence requirement. In *Scrivner*[48], Belgium's insistence that UK nationals should have resided in the country for five years before being entitled to receive the minimum subsistence allowance ("minimex") was found to be discriminatory by the Court. Meanwhile, such a rule would also, almost certainly, be inimical to a regime of complex equality, as it is unlikely that long-term residence in Belgium would form part of the distributive community's shared understanding of a benefit intended to alleviate the hardships of *unemployment*. Likewise, in *Frascogna*[49], France's setting of a fifteen-year residence requirement as a condition precedent for the receipt of a special old-age allowance was held to be nationality discrimination by the ECJ. A Walzerian view of the case would similarly result in the condemnation of the Member State, as long as the relevant distributive community did not consider long-term residence in France to be a part of its shared understanding of a benefit designed to alleviate the hardships of *old age*.[50]

5.4.2. Cases deriving from the Second World War

[45] Case 237/78 *Palermo née Toia*, supra n 39. The allowance was granted when the woman concerned reached the age of 65. The distributive community would therefore (probably) find that the "meaning" of the allowance was assistance for the elderly, in which case the presence of nationality within the distributive sphere (the nationality of the recipient's *children* in this case) was tyrannical – an undue invasion by the sphere of membership. However, another of the conditions for the granting of the allowance was that the woman concerned should have had *at least five* children. If the distributive community found, then, that the meaning of the whole scheme was increasing France's birth rate, it might well be justified in saying that *the nationality of the children born* did form part of this meaning; presumably children born with non-French nationality would be excluded from the calculation of France's birth rate, thus precluding their mother from receiving the allowance.

[46] Case 261/83 *Carmela Castelli v Office National des Pensions pour Travailleurs Salariés (ONPTS)* [1984] ECR 3199.

[47] Case 94/84 *Office national de l'emploi v Joszef Deak* [1985] ECR 1873.

[48] Case 122/84 *Kenneth Scrivner and Carol Cole v Centre public d'aide sociale de Chastre* [1985] ECR 1027.

[49] Case 256/86 *Maria Frascogna v Caisse des dépôts et consignations* [1987] ECR 3431.

[50] But, again, would the communities not be within their rights to argue that pay-outs should be denied to those who had never paid anything in, such as new-arrivals? See the section on solidarity below at 5.5.

In more complicated cases, however, the Aristotelian avenue and the Walzerian avenue lead, or at least might lead, in different directions. In *Fossi*[51], the German Government was of the opinion that an Italian national, habitually resident outside the Federal Republic of Germany, should be denied a total disablement pension claimed under a social security law dating back to the Third Reich (he had worked in a mine in Sudetenland during the War). The ECJ, taking the view that this benefit fell outside the scope of the pertinent Community laws, agreed with this opinion. Walzer, however, might wonder what the relevant distributive community would say was the *meaning* of the benefit. The Federal Republic of Germany had assumed certain of the obligations incumbent upon the mineworkers' social security institutions in existence before 1945, and had amended the "Imperial Law" concerned[52]. The purpose of this amendment, as stated by the Government before the Court, was:

> *"to alleviate certain situations which arose out of events connected with the National Socialist regime and the Second World War"*[53].

Now if the distributive community was of the same view as regards the meaning of the law, and the benefits awarded thereunder, it might take the view that an Italian permanently resident in Italy *was* entitled to receive the pension. The alleviation of hardships caused by the Nazis, if that was indeed the project, would not appear to come to an end on reaching the national border: the Nazis caused hardship in many different countries. If Mr Fossi had a hardship caused by the Nazis which needed alleviating, it would surely need alleviating *wherever he was.* The presence of elements, like nationality and residence, proper to the sphere of membership, in the sphere of distribution (of the type of pension sought by Mr Fossi) would therefore be *tyrannical*. Once confined to their own sphere, however, the distribution could take place in the correct manner, and in perfect accordance with the meaning of the goods being distributed.

Tinelli[54] was a very similar case, only there the purpose of the law under consideration was given as:

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[51] Case 79/76 *Carlo Fossi v Bundesknappschaft* [1977] ECR 667.
[52] Ibid., para. 2.
[53] Ibid., para. 7.
[54] Case144/78 *Renzo Tinelli v Berufsgenossenschaft der Chemischen Industrie* [1979] ECR 757.

> *"to facilitate the re-integration, following events connected with the National Socialist regime and the Second World War, of exiles and refugees who contribute by their work to reconstruction in the Federal Republic of Germany."*[55]

Assuming that this "meaning" (of the law and the pensions available thereunder) was also the one endorsed by the distributive community, then Mr Tinelli's being resident outside the Federal Republic of Germany might indeed have a bearing on whether or not he should receive the pension. If the pension rewarded those who had contributed by their work to reconstruction *in the Federal Republic*, then those who had spent their working lives in Italy (as Mr Tinelli had done) would be unlikely to qualify. In other words, residence in this case formed *part of* the shared meaning of the good at issue; its presence in the distributive sphere was thus appropriate, not tyrannical.

In the same way, it is likely that *nationality* would form part of the shared meaning in the case of *Even*[56], where the good in question was an early retirement pension, granted by Belgium, without any reduction, to *Belgian* veterans of the Second World War. Mr Even was a French national in receipt of a war service pension under French legislation; when he moved to Belgium and applied for the *Belgian* veterans' pension, his application was refused. The ECJ provided no relief, declaring that the benefit fell outside the scope of the relevant Community Regulation. And a Walzerian enquiry too, it seems, would exonerate Belgium. The purpose of the veterans' pension was:

> *"to offer to Belgian workers who fought in the Allied forces between 10 May 1940 and 8 May 1945 and suffer incapacity for work attributable to an act of war a testimony of national recognition for the hardships suffered during that period and to grant them, by increasing the rate of the early retirement pension, a benefit by reason of the services thus rendered to [Belgium]."*[57]

While not pre-empting the distributive community, it seems likely that "being Belgian" would form part of its shared understanding of the pension. Nationality of Belgium and, perhaps more interestingly, loyalty to Belgium would seem to be absolutely central to this particular good. Mr Even's having fought for France

[55] Ibid., para. 7.
[56] Case 207/78 *Criminal proceedings against Gilbert Even and Office national des pensions pour travailleurs salariés (ONPTS)* [1979] ECR 2019.
[57] Ibid., para. 12.

would take him outside the range of potential distributees, and, from a Walzerian point of view quite legitimately, outside the distributive sphere.[58]

Among the other cases deriving from the Second World War, *Vigier*[59] is also worth considering. Ms Vigier, despite being born in Germany (in 1923), was of French nationality and resided in France. As a "victim of persecution" within the meaning of Germany's Federal Compensation Law, and indeed having already received some compensation from Germany for loss of educational opportunities, Ms Vigier applied in 1975 for authorization to make retroactive payment of contributions with regard to invalidity and old age insurance. The Federal Insurance Office rejected this application; according to the relevant law, Ms Vigier had to have already paid *at least one* contribution to the competent (German) institution in order to be regarded as an "insured person". Ms Vigier argued that contributions which she had made *in France* ought to have been taken into account, as if they had been made in Germany. The ECJ disagreed with this; such equivalence was not required within the circumstances of this particular case.

For a complex egalitarian, the first line of enquiry would be the *meaning* of the distribuend, as shared by the members of the distributive community. It is hard to anticipate what might happen here. If the distributive community includes all of the victims of Nazi persecution, it seems odd in the extreme that they should decide that those victims who now live outside Germany (and who therefore find it hard to make the requisite payment) must be regarded as having foregone their compensatory rights within Germany. Victims of persecution very often live outside the country where that persecution took place, the persecution itself having driven them away. On this analysis, merely possessing the status of victim should be enough to guarantee someone in the position of Ms Vigier the right to participate in the distribution, even from France. On the other hand, if this good is less an act of compensation for an earlier wrong, and more a simple return on an earlier investment, then it is the payment of the contribution, rather

[58] But contrast Case 9/78 *Directeur régional de la Sécurité sociale de Nancy v Paulin Gillard and Caisse régionale d'assurance maladie du Nord-Est, Nancy* [1978] ECR 1661. Here, a Belgian ex-POW was refused a special old age pension by the French authorities. Without usurping the role of the distributive community, it seems likely that a Walzerian analysis would produce a positive result for Mr Gillard, as the French law in question talked about a claimant's wartime service "in the *French or Allied* Forces" (ibid., para. 5, emphasis added).

[59] Case 70/80 *Vigier*, supra n 24.

than the status of victim, which should be determinative; those outside the country and therefore less able to contribute can legitimately be excluded.

It can be seen that the meaning of the distribuend in *Vigier* is very ambiguous. Walzer's method, which allocates the "casting vote", as it were, to the distributive community itself, provides a straight path to a resolution of the problem.[60] Whatever the distributive community says goes. An Aristotelian analysis of the case, meanwhile, simply exacerbates the earlier ambiguity. It seems logical that someone who manages to pay the stipulated contribution (henceforth a "payer") is more likely to be a German resident, and therefore more likely to be a German national, than a non-payer, who is more likely to be a resident of another Member State, and therefore more likely to be of a non-German nationality. It is submitted, then, that the rule set out in Germany's law concerning victims of persecution is indirectly discriminatory against non-Germans (with no obvious justification), breaching if nothing else Article 18 TFEU (then Article 12 EC). In other words, it is a case of unlikes being treated alike: Germans and non-Germans differ as to the ease with which they can find out about, get information on, and finally *make* the necessary contribution, but both are made subject to the same rule – a classic example of the second limb of the Aristotelian test in action, one might have thought. However, the ECJ nicely illustrates how unforeseeable the test is by declaring there to have been no discrimination at all. The Court relied on an earlier case as authority for the proposition that a condition of "prior affiliation" was acceptable, and that this did not mean that the Member State making the condition was compelled "to treat as equivalent insurance periods completed in another Member State"[61]. The two groups of potential payers remain un-alike, and their treatment remains like, but neither the general principle of equality, nor any of its specific enunciations within EU legislation, would seem to have been breached.[62]

[60] This is the orthodox position, anyway. For an alternative version of the theory, Mediated Complextiy, in which the casting vote is given to the *Judge*, see below Chapter 8.
[61] Case 70/80 *Vigier*, supra n 24, para. 19.
[62] Contrast Case 237/78 *Palermo née Toia*, supra n 39, where mothers of French nationality and mothers of non-French nationality faced the same rule, even though the mothers of French nationality were always going to have an easier time fulfilling it (that is, bearing French children) than their non-French counterparts. *Here*, the Court had no difficulty in finding the rule to be indirectly discriminatory.

5.4.3. The more recent case-law

In Chapter 2, it was explained how even Walzer himself understood the need for an Override in cases where complex equality inadvertently sanctioned, via its particularism, disagreeable attitudes or practices. He called it the Minimal Morality. Later in the same chapter it was suggested that, for EU purposes, the ECHR could fulfill this role, especially seeing as it represented a consensus among all the Member States with regard to human rights and fundamental freedoms. In the ECJ's more recent case-law on the subject of the free movement of persons, one can detect the emergence of a not dissimilar mechanism in EU law, even in its current, simple egalitarian form.

A good example comes from Advocate General Jacobs in the case of *Konstantinidis*[63]. Here, a Greek national who established himself as a masseur in Germany complained when he was forced to accept an "insulting [and] unpronounceable"[64] transliteration of his name on official documents; the German court made a reference. Jacobs was of the opinion not only that this state of affairs constituted discrimination on grounds of nationality[65], but also that it could be impugned, if need be, as an indistinctly applicable restriction on the freedom of establishment[66]. Reaching this last conclusion, he stated:

> *"[A Community national invoking the free movement provisions] is […] entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say "civis europeus sum" and to invoke that status in order to oppose any violation of his fundamental rights."*[67]

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[63] Case C-168/91 *Christos Konstantinidis v Stadt Altensteig* [1993] ECR I-1191.
[64] Ibid., at 1202 (Para. 12 of the Opinion).
[65] See ibid., at 1205 (Para. 26 of the Opinion): "The entries made in official registers […]are of such obvious importance that the migrant worker should be entitled to demand that he, like any citizen of the host country, be properly identified in those documents and have his name written in a manner that is not insulting and offensive to him." See further 1206 (Para. 27 of the Opinion): "[A]s regards entries in official registers he is entitled to the same treatment as German nationals".
[66] Following "Cassis de Dijon" [Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649] in relation to goods and Case 76/90 *Manfred Säger v Dennemeyer & Co. Ltd.* [1991] ECR I-4221 in relation to services.
[67] Supra n 63, at 1211-1212 (Para. 46 of the Opinion).

A person exercising his right to freedom of establishment "should in general have to comply with the local legislation"[68]; this is reminiscent of Walzer's insistence that all activity within a given sphere should be regulated by the rules *intrinsic to that sphere*. It is nicely captured by the saying, "When in Rome, do as the Romans do". But the Advocate General questions,

> *"whether… a disproportionate restriction or one entirely devoid of justification could be applied against a national of another Member State".*[69]

In other words, regardless of whether or not it is the custom of the host State and regardless of whether or not all the nationals of the host State have to do it as well, if a practice beaches the "common code of fundamental values", the migrant may lawfully object to it. In the case in hand, of course, it was only Mr Konstantinidis who was being denied the right to be identified properly. By declaring this to be a restriction on free movement, the Advocate General, and indeed the Court[70], brought the treatment of Mr Konstantinidis into line with that of ordinary German nationals. Community law thus granted him the equality which national law had withheld. This case suggests that a move to the Walzerian system of equality would not be as big a shock for the Court as might have been thought. The logic followed by Jacobs here (local meaning in the first instance, with Override in reserve) is almost identical to that which a complex egalitarian might have used.[71]

Some years later, Advocate General Jacobs adopted a similar technique in the case of *Bickel and Franz*[72]. Here, two defendants in criminal proceedings in Bolzano (Italy), both from German-speaking countries, requested that their trials be carried out in German. Owing to the presence of the German-speaking minority in the Trentino-Alto Adige Region, there were laws in place allowing judicial proceedings to be conducted in German in courts in that region.

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[68] Ibid., at 1212 (Para. 48 of the Opinion).
[69] Ibid.
[70] In a short judgment, the Court held that Germany's behaviour could be a violation of the right of establishment, provided that its effect (on Mr Konstantinidis) was felt *when he was pursuing his occupation*, for example, if potential clients were confusing him with other persons.
[71] In fact, a complex egalitarian might not have needed recourse to the Override, since it is fairly unlikely that the German population would hold that one's nationality formed any part of the shared meaning of the right to be properly identified.
[72] Case C-274/96 *Criminal proceedings against Horst Otto Bickel and Ulrich Franz* [1998] ECR I-7637.

Therefore, any locals who had made this request would have been accommodated. The Bolzano court asked the ECJ whether it could refuse the two men's requests, or whether such a refusal would constitute discrimination on grounds of nationality.

While considering whether the subject-matters of the two men's trials were within the scope of the Treaty, Advocate General Jacobs made use of the (at that time) new citizenship provision at Article 18 (ex 8a) EC, now Article 21 TFEU. Of this provision, he commented:

> *"The notion of citizenship of the Union implies a commonality of rights and obligations uniting Union citizens by a common bond transcending Member State nationality. The introduction of that notion was largely inspired by the concern to bring the Union closer to its citizens and to give expression to its character as more than a purely economic union."*[73]

This transcendent "commonality of rights", like the earlier "common code of fundamental values", is not dissimilar to the Override, and Jacobs seems to be using it in a similar way, that is, as a backstop, to be deployed if all else fails. But not everyone has been quite so optimistic about the advent of EU citizenship. More, for example, has written:

> *"it lacks connection to a set of common or shared values and, moreover, to a proper democratic process"*[74].

Jacobs was probably on safer ground linking his "Minimal Morality" to the ECHR, as he did in *Konstantinidis*.

In the event, the Advocate General found that there *was* nationality discrimination in *Bickel and Franz*, and did not accept any of Italy's proposed justifications for treating the two foreigners differently to the local population. The Court agreed with this conclusion.

A Walzerian examination produces the identical result. Indeed, the boundary breach in this case is stark. Mr Franz's "being German" and Mr Bickel's "being Austrian" are almost certainly negative dominants, subject to whatever the

[73] Ibid., at 7645 (Para. 23 of the Opinion).
[74] G More, "The Principle of Equal Treatment: From Market Unifier to Fundamental Right?" in P Craig and G de Búrca (eds), *The Evolution of EU Law* (OUP, Oxford 1999) 539.

members of the distributive community decide is the shared meaning of the right to ask for German to be used in judicial proceedings in Bolzano. To justify denying the right to foreigners, they would have to resolve that the meaning of the right was the protection of *their minority* (the German-speakers of Bolzano) and *their minority only*. But this would be perverse and would surely require application of the Override. A right to ask for German to be used in judicial proceedings is to help German-speaking defendants, to save money (on translation and interpretation), and generally to ensure the smooth-running of the trial and thus to aid justice. Any other consideration, such as local loyalty, would without doubt be regarded by a complex egalitarian as extraneous[75].

The Court's "new" technique for widening the scope *rationae personae* of Community law, namely via an expansive reading of Article 21 (then Article 18), was set to continue and indeed to become its pre-eminent method for dealing with free movement of persons cases. A more recent example is *Grzelczyk*[76]. The case concerned a French national who went to study at a university in Belgium. For the first three years he supported himself by working, but in the fourth year he applied for Belgium's minimum subsistence allowance (the "minimex"). This application was rejected on the grounds that he was a student, and therefore did not fall within the scope of the appropriate Regulation (Regulation 1612/68[77]); it was also established Community law that, while migrant students who fulfilled the requisite conditions could sometimes receive assistance from the host State with regard to their tutorial fees, they could *not* receive any kind of maintenance grant[78].

Following *Bickel and Franz*, the Court gave a wide interpretation to the citizenship provision (Article 21, then Article 18), so that it encompassed any Member State national who was

[75] Note how *Bickel and Franz* is the reverse of a case like Case 207/78 *Even* supra n 56, where local loyalties were *intrinsic* to the distributive sphere.
[76] Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193.
[77] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ English special edition: Series I Chapter 1968(II)/475.
[78] See, for example, Case 293/83 *Françoise Gravier v City of Liège* [1985] ECR 593; Case 197/86 *Steven Malcolm Brown v The Secretary of State for Scotland* [1988] ECR 3205.

"exercis[ing] [their] right to move and reside freely in another Member State"[79]

This of course covered Mr Grzelczyk. Article 18 (ex 12) could thus be utilized to guarantee him equality of treatment vis-à-vis students who were native to Belgium (and who received the minimex). The Court acknowledged that this was a departure from the earlier student case-law, especially *Brown*[80], but justified this on the grounds that, since that case was decided, a number of developments had occurred in EU law, including the signing of the Maastricht Treaty and the creation of Union citizenship. Nevertheless, the Court still insisted on fulfillment of the two conditions from the Students' Directive (Directive 93/96[81]), namely, firstly, that the student must have sufficient resources to avoid becoming a burden on the public finances of the host Member State, and, secondly, that the student must be covered by sickness insurance[82].

From a Walzerian perspective, there is a clear boundary breach here, occurring at the level, not of the distributees this time, but of the distributors themselves. Since withholding the minimex from Mr Grzelczyk would to all intents and purposes force him to return to France, one could allege that the Distributor in the sphere of minimum subsistence allowances was attempting to usurp the role of the immigration services, by analogy with the US case of *Graham*[83]. This would of course be an illegitimate crossing of the boundary between the two spheres.

5.5. Solidarity

5.5.1. What is transnational solidarity?

[79] Case C-184/99 *Grzelczyk*, supra n 76, para. 33.
[80] Case 197/86 *Brown*, supra n 78.
[81] Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students [1993] OJ L317/59.
[82] And the host Member State was not allowed to *automatically* interpret the mere fact of asking for the allowance as proof of non-fulfilment of the first condition. See Case C-184/99 *Grzelczyk*, supra n 76, paras. 42 and 43.
[83] See supra, text accompanying n 29.

Solidarity has been described as the "cohesion and commonality of purpose of a given group"[84], and solidarity rights have been defined as giving "legal form to social relations of reliance and trust"[85]. The bond of solidarity which a national of a given Member State feels towards his fellow nationals may be based on a variety of things, including shared culture, history, tradition, language, or even sporting prowess. As has been hinted earlier[86], solidarity would play a major role when a distributive community came to determine its shared understandings, if the ECJ were to adopt a Walzerian approach to equality. If it was proposed to distribute a certain benefit to a newly arrived migrant worker from another Member State, say, a lot would depend on whether the members of the distributive community considered that the solidarity which already existed between them *extended* to cover the newcomer. As things stand, the extension or otherwise of solidarity is not a matter for community-members at all, but is decreed by the ECJ from Luxembourg in its ongoing attempt to integrate Europe by "redrawing [national] boundaries"[87]:

> *"Especially in the field of social assistance (the sanctum sanctorum of national welfare […]), the orientation of the ECJ has been very clear: its jurisprudence has tended to restrict the scope of discretionality of the Member States, contrasting their "closure" tactics by appealing not only to the principle of non-discrimination, but often by referring also to the need to promote transnational solidarity"[88].*

In a fascinating article, Somek has investigated the natures of national solidarity and transnational solidarity, inter alia, to see if there is any connection between them.[89] His initial finding is not very encouraging:

> *"Far from being an extension of national solidarity and serving as a transmitter, transnational solidarity is clearly in opposition to it."*[90]

While the basis of national solidarity is fairly clear-cut[91], Somek finds the root of transnational solidarity to be "mysterious"[92]. Put another way, the link between

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[84] M Ferrera, "Towards an "Open" Social Citizenship? The New Boundaries of Welfare in the European Union" in G de Búrca (ed), *EU law and the welfare state: in search of solidarity* (OUP, Oxford 2005) 19.
[85] RM Unger, *False Necessity: Anti-necessitarian Social Theory in the Service of Radical Democracy* (CUP, Cambridge 1987) 537, cited in Somek, supra n 39, 801.
[86] Supra n 41 and n 50.
[87] Ferrera, supra n 84, 24.
[88] Ibid., 32.
[89] Somek, supra n 39.
[90] Ibid., 805.

the national and his nation (for example, Member State A) is reasonably obvious, but what is the link between the EU migrant and Member State A? In *D'Hoop*, the Court accepted that there may have to be a "real link" between migrant and State in order for a tideover allowance to be granted.[93] A "real link" condition was also accepted as legitimate in *Collins*[94]. In *Bidar*[95], the Court endorsed the making of university funding conditional upon the existence of a "genuine link" between the student and the host Member State. The Court is implying here that there is a kind of continuum of linkage, with real or genuine links at one extreme and (presumably) false or bogus links at the other. But what is the *nature* of the link? What is it *based on*? Somek rightly notes that the Court has been of very little help here, and that ultimately the link seems to be one of (what he calls) "being and time"[96], that is, that if a person is *in* a certain place *for* a certain length of time, they will develop a link with that place.[97] He comments:

> *"This is not much. It is, in a sense, even amazingly meagre. One may wonder, indeed, whether being and time, taken by themselves, do suffice to establish a connection with any meaningful conception of solidarity."*[98]

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[91] See the first paragraph of this section.

[92] Somek, supra n 39, 801.

[93] Case C-224/98 *Marie-Nathalie D'Hoop v Office national de l'emploi* [2002] ECR I-6191. Specifically, between the migrant and the State's employment market. However, in the Court's view, the Royal Decree at issue in this case went too far. Note Advocate General Geelhoed's Walzerian language here; he focuses on the distribution of tideover allowances and notes that there is a conflict between the distributive criterion and the good being distributed: "[T]he refusal to allow nationals access to the programmes purely because they completed their education in another Member State appears problematic… [This refusal] does not to my mind square with the declared objective." See ibid., at 6206-6210 (Paras. 45-56 of the Opinion).

[94] Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703.

[95] Case C-209/03 *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-2119.

[96] Somek, supra n 39, 807.

[97] Thus, the nexus between the migrant and the host Member State develops *over time*. The most well-known instance of the Court's saying that the link is formed by the passage of time is probably in Case C-209/03 *Bidar*, supra n 95, where it held that it was not illegitimate for a Member State to require of a student "a certain degree of integration" before it would grant him or her financial assistance (ibid., para. 57), and that this "may be regarded as established by a finding that the student in question has resided in the host Member State for a certain length of time" (ibid., para. 59). In the *Bidar* case itself, the Court was prepared to accept three years' prior residence as a suitable prerequisite. Five years was also found to be acceptable in the later case of *Förster*: Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-8507.

[98] Somek, supra n 39, 807.

5.5.2. Consideration, responsibility and asymmetric solidarity

Elsewhere, Somek explains how at least one form of solidarity, national or transnational, "is mediated by the self-interested motives of co-operation for a mutual gain"[99]. Where this form of solidarity is prevalent, life will be centred on the concept of *transaction*. When contemplating distributing a benefit to a migrant, members of a distributive community might employ a "consideration argument"[100], reasoning that only those who have paid for a certain benefit should be able to enjoy it.[101] This approach to benefit-distribution reduces all social activity to an unbroken series of financial bargains – an unceasing carousel which never lets new passengers on board. And those who do not (cannot) concede the *quid* may not receive the *quo*. Echoing Lord Atkin's famous question, "Who, then, in law is my neighbour?"[102], citizens may decide that they need not love a neighbour who claimed rights while repudiating what they saw as the concomitant duties.

As well as the fact that they have not "paid for" the benefit in question, foreigners (especially indigent ones) may also face arguments based on the concept of *responsibility*. In deciding whether there are any "solidaristic" bonds between them and an impecunious foreign migrant seeking a certain national benefit, the members of a distributive community may argue that this individual is the author of their own misfortune.[103] The responsibility argument is thus a kind of worm in the bud of solidarity. Person A can distance himself from Person B by examining in ever greater detail the personal choices made by B, and reasoning that B's plight is a direct result of those choices, for which B and B alone must be responsible; A, convinced that he would never make such choices, can no longer see the *mutuality* which formerly characterized his relationship with B, and so the bond of solidarity is ruptured. As Somek puts it, solidarity has "switch[ed] into a path-dependent mode"[104]. Path-dependence is at least not

[99] Ibid., 812.
[100] Davies, supra n 14, 47.
[101] In this section, the phrase "paid for" covers not just direct contribution, but also indirect contribution via the payment of national tax. And see also RCA White, "Citizenship of the Union, Governance, and Equality" [2006] 29 Fordham International Law Journal 790 at 793, where he comments that, "[c]itizenship in its classical sense involves duties as well as rights"; he goes on to note that EU citizenship entails the second but not (at the moment) the first.
[102] In the Scottish case of *Donoghue v Stevenson*: [1932] AC 562, 580.
[103] "Solidaristic" is Somek's word: supra n 39, for example at 809.
[104] Ibid., 808. Equally destructive of solidarity is a dependence on what might be called *future paths*, in other words, *risk*. In this scenario, those who find themselves in a low-risk category

nationality-dependence; it is quite possible that a distributive community could take this approach towards a *national* whom it judged to be irresponsible. Similarly, a *migrant* who had made *responsible* choices may well find favour. But the fact remains that an applicant like Mrs Martínez Sala[105], a Spaniard who, after a chequered employment history in Germany, had subsequently lapsed into (potentially) long-term unemployment, may not endear themselves to a German distributive community looking to dispense child-raising allowances.[106]

A community which takes an overly transactional view of benefits, and which is unduly concerned with the "link" between benefit and recipient, is more likely to employ responsibility arguments, in parallel with consideration arguments, to query a given recipient's entitlement. The thrust of the argument would be that the would-be recipient has not come to the bargain with clean hands, that is, that they have vitiated the bargain via their behaviour. While a consideration argument questions whether there was ever any entitlement at all, then, a responsibility argument works on the basis that what entitlement there was has been lost.

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with regard to a certain matter may try to break with those whose equivalent risk is deemed to be higher.

[105] Referring to Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.

[106] A number of theorists, including Trappenberg, Elster and Gutmann, discuss the introduction of a responsibility element into the theory of complex equality: Margo Trappenburg, "In Defence of Pure Pluralism: Two Readings of Walzer's *Spheres of Justice*" The Journal of Political Philosophy, Vol 8, No 3, 2000, 343, 346 and 352; J Elster, "The Empirical Study of Justice" in D Miller and M Walzer (eds), *Pluralism, Justice, and Equality* (OUP, Oxford 1995) 98; A Gutmann, "Justice across the Spheres" in ibid., 99 and 112 et seq. As Gutmann points out, though, varying distributions in accordance with people's voluntary behaviour itself leads to a certain degree of inequality/ discrimination: ibid., 114. Walzer himself is not opposed to the taking into account of responsibility, although he says it should constitute part of the shared understanding of the good in question, rather than acting as a distributive criterion in its own right: M Walzer, "Response" in Miller and Walzer, op. cit., 294. This seems to be the correct approach. In the free movement of persons case of *Tas-Hagen*, for example, it would be up to the distributive community to decide whether "not having chosen to live abroad" formed part of its shared understanding of benefits for civilian war victims. Did Mr and Mrs Tas-Hagen's choice to move abroad indicate some kind of desertion of the national cause, or lapse of loyalty, such that, in making it, they had abandoned their entitlement to compensation for wartime (and immediate post-war) hardships? Was the choice – the conscious act of two responsible adults – a severing of their connection to the Netherlands of such severity that it vitiated any earlier demonstrations of loyalty? The distributees' responsibility (or lack thereof) for the move should not be the determinative criterion for the granting of the benefit (as it in fact had been), but *should* feature in the debate as to its meaning. In other words, was blamelessness for any move away from the Netherlands an essential part of how the community understood this particular benefit? See Case C-192/05 *K. Tas-Hagen and R. A. Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad* [2006] ECR I-10451.

Davies accuses the Court of Justice of endorsing the consideration-based approach in its equality case-law and of "misunderstanding of the nature of community"[107]. The Court's "misguided philosophy"[108] underestimates man's capacity for benevolence towards his fellows, even where it is without reciprocation, or at least where the reciprocation is unseen (or hard to see). A rule (that old age pensioners may swim in the local pool at a reduced rate, for example) may form part of a complicated web of causes and effects, with one thing subsidizing another thing, so that the national may be at fourth or fifth remove from the benefit. But if the Court of Justice, seeing no link, forces the local authority to open the benefit out "to all Europe"[109], then the benefit will probably collapse under the weight of oversubscription, and be lost.

The point is that when the national pays his tax, he does not see clearly the return; he does not see clearly what, if anything, is "in it" for him. And yet he pays anyway. Ferrera calls this ""a-symmetric" solidarity"[110]. This more optimistic vision of solidarity has been summed up by Davies as follows:

> *"We do not ask how much tax has been paid by their parents before allowing a child free education, or how much has been paid by a person needing healthcare or other services. Indeed, it is a premise of solidarity that there will be discrepancies: that many individuals will receive much from the authorities to which they have not financially contributed, and others will contribute more than they receive. This is justified by an underlying concept of membership, or perhaps of humanity, but it can also be imagined in terms of transactions that are more than material or financial; the primary payment of the community member is perhaps loyalty".*[111]

It is suggested that distributive communities are just as likely to adopt this more positive interpretation of solidarity as they are the "meagre" one proffered by Somek. The glass can also be viewed as half full.[112] As Ferrera states,

> *"the entry of foreign workers into national sharing spaces will imply new contributions and not only new outlays".*[113]

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[107] Davies, supra n 14, 48.

[108] Ibid. The particular case which Davies is criticizing is Case C-388/01 *Commission v Italy*, supra n 15.

[109] Ibid.

[110] Ferrera, supra n 84, 31.

[111] Davies, supra n 14, 48 (emphasis added).

[112] Banting and Kymlicka have shown empirically that multiculturalism does *not* threaten a country's welfare state, and can even make it stronger: K Banting and W Kymlicka, "Multiculturalism and Welfare" Dissent (Fall 2003) 59, throughout but see in particular 65.

What White calls "collective… solidarity"[114], and what others have dubbed the "Social Union"[115], need not be a mere pipe-dream. Already the necessary rights have been put in place, with an entire section dedicated to solidarity in the EU's Charter of Fundamental Rights[116]. The existence of "pan-European solidarity publics"[117] and a "pan-European solidarity space"[118] is starting to move from the realm of the impossible to the realm of the possible, thanks to many decades of "solidarity-making"[119] on the part of the EU and its Court. Solidarity trans-nationalization is an appealing prospect for many social groups who wish to strengthen cooperation in the field of social policy. Businesses such as pension-providing institutions also stand to benefit from the economies of scale which solidarity trans-nationalization would lead to. Providing that these savings were passed on to the consumer, this benefit could in turn be enjoyed by millions of workers across Europe.

5.5.3. Solidarity and complex equality

Davies has written:

> *"[M]embership is not monolithic, but in accordance with modern ideas about identity and belonging, a multi-level, layered thing."*[120]

This is of course in keeping with a Walzerian world, where multiple understandings happily co-exist. Dougan and Spaventa have declared:

> *"[T]he concept of social solidarity is not a constant or given, but dynamic and up for renegotiation"*[121].

Again this recalls Walzer's world, where social meanings are continually shifting and where variations are "inevitatble"[122].

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[113] Ferrera, supra n 84, 34.
[114] White, supra n 101, 806.
[115] C Tomuschat, "Annotation *Martínez Sala*" (2000) CMLRev 449, 454.
[116] Charter of fundamental rights of the European Union [2000] OJ C364/1, Chapter IV.
[117] Ferrera, supra n 84, 32.
[118] Ibid.
[119] Ibid.
[120] Davies, supra n 14, 54.
[121] M Dougan and E Spaventa, ""Wish You Weren't Here…". New Models of Social Solidarity in the European Union" in E Spaventa and M Dougan (eds), *Social Welfare and EU Law* (Hart Publishing, Oxford 2005) 216. And even Somek, following Unger, has commented that solidarity is "highly context-sensitive": Somek, supra n 39, 801.

It is submitted that solidarity is itself a Walzerian concept. Different communities are like spheres, separate one from another, but with a high degree of connectedness as between the members of each. However, the separation is not set in stone and the boundaries are in constant flux. A fellow member of one's sphere may have been a member of the neighbouring sphere yesterday, or he may even *become* a member of the neighbouring sphere tomorrow. Moreover, connectedness of migrant and State is not proven by a single "representative element", for example, the Member State in which the "migrant" completed his or her full-time secondary education. Such a stringent approach risks turning the element in question into a requisite entry-token which will in time become dominant, yielding access to a particular distribuend "to the exclusion of all other representative elements".[123] There may in fact be multiple ways in which such connectedness can be shown, as the Court seemed to accept, for example, in *D'Hoop*.

It also implicitly accepted this fact in the recent case of *Metock*[124], where the Court was considering (not for the first time) the distribution of the right of residence to third country national spouses of EU citizens. It held that a condition of prior lawful residence in another Member State, imposed by Ireland on such spouses, was precluded by EU law. As Costello has nicely put it, the Court "support[ed] a vision of residence rights in which origins and belonging in the EU are decoupled"[125]. A distributee whose origin is a certain place can always assert, usually unchallenged, that they *belong* there, while a distributee whose origin is elsewhere has a much harder time making the same assertion. Origin, then, can be used tyrannically and, in situations where this is happening, the Court is right to begin to "decouple" it from belonging, thus allowing claimants in the future a much broader range of means by which to demonstrate that a certain place is, or should be, their home.

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[122] Walzer, *Spheres of Justice*, supra n 26, 226.

[123] The quotation is from Case C-224/98 *D'Hoop*, supra n 93, at para. 39. The word "migrant" is in inverted commas because, in the *D'Hoop* case itself, the party claiming the Belgian benefit was in fact Belgian herself.

[124] Case C-127/08 *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241.

[125] C Costello, "*Metock*: Free Movement and "Normal Family Life" in the Union" [2009] CMLRev 46: 587, 622.

As Ferrera puts it, possession of "national roots"[126] can be employed by potential distributees as a "marker of insiderhood"[127], and by the gatekeepers of the distributive sphere in question as a "filter for… rights"[128]; those with the marker come in, while those without the marker stay out. But thanks to the Court,

> *"social rights (and the corresponding obligations) have been decoupled from national citizenship within the EU […]. [Consequently,] the underlying and ultimate filtering function performed by national citizenship qua overall and solid container of rights and basic instrument of closure is no longer there."*[129]

In Walzerian terms, nationality is slowly being stripped of its (potential) dominance, making the distribution altogether fairer for distributees from other Member States.

5.6. Conclusion

The tentative conclusion must be that the ECJ's applying Walzerian complex equality to its case-law on nationality discrimination would be a positive development for EU law. In some cases it would produce fairer and more logical results – *Gilly*, for example, or some of the cases arising from World War Two. However, even where the result would be the same as that arrived at under an Aristotelian regime, the reasoning is noticeably clearer; *Walloon Waste* and *Angonese* are two examples. This Walzerian reasoning avoids the tortuous intellectual gymnastics to which the Court must sometimes resort at present; such gymnastics lead to awkward, opaque judgments, unintelligible to the average EU citizen, who then feels further alienated from the Union and its law. In the later case-law one can even detect a slight Walzerian dimension creeping into the Court's thinking, which should be encouraged.

One point that must be stressed, though, is the need to strengthen solidarity within the EU. Solidarity goes hand in hand with complex equality, and indeed the two concepts are related, as mentioned in section 5.5.3. A complex egalitarian approach to free movement cases shines a light on local meanings,

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[126] Ferrera, supra n 84, 16.
[127] Ibid.
[128] Ibid.
[129] Ibid., 22. The Court is not alone in pushing for a redefinition of the concept of nationality. See, for example, R Rubio-Marín, *Immigration as a Democratic Challenge* (CUP, Cambridge 2000) 245.

and the less solidaristic a community, the more likely it is that nationality, or some other place-specific criterion, will still play a part in how it understands certain goods. Of course this still leaves the Court with the Override, and, exceptionally, the ECJ may be able to overrule the Member State if it is in the name of preserving co-existential equilibrium, as described later in the dissertation.[130] However, it is submitted that the best way of ensuring that antiquated meanings do not poison distributive criteria is to work for change – *reinterpretation* – at the local level. Burying one's head in the sand of simple equality, on the other hand, is not a viable option.

[130] See below section 9.5., entitled "Macro and micro: the equilibrium of co-existence". A further option is use of the alternative theory – "Mediated Complexity" – described in Chapter 8, which transplants the role of ascertaining meanings from the community to the Bench itself.

6. Semi-suspect and non-suspect grounds

6.1. Introduction and explanation of terminology

The doctrine of suspect classifications is American in origin, although it now has a large following outside the US as well. If a law or executive action makes or relies on a classification which has been recognized as "suspect", then such law or action will be presumptively unconstitutional, will be subject to heightened or "strict" scrutiny on the part of the courts, and is liable, unless a non-discriminatory objective can be shown, to be struck down. While it is difficult to pinpoint the exact moment of its birth, the 1944 case of *Korematsu v US*[1] would seem to provide the earliest *full* statement of the doctrine:

> *"It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."*[2]

Over the next twenty or so years, the doctrine grew in popularity until it became the Supreme Court's principle method for dealing with discrimination cases, particularly in such decisions as *McLaughlin v Florida*[3] and *Loving v Virginia*[4].

The ECJ itself has never explicitly said that it is employing a theory of suspect classifications. However, a number of Advocates General have made mention of the doctrine (for example, Poiares Maduro AG in *Coleman*[5], and more

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[1] *Korematsu v United States*, 323 US 214 (1944) (reliance on racial classification acceptable in the context of war).

[2] Ibid., 216. Although the concept of strict scrutiny (minus the concept of suspect classifications) can perhaps be traced back further.

[3] *McLaughlin v Florida,* 379 US 184 (1964) (reliance on racial classification invidious).

[4] *Loving v Virginia*, 388 US 1 (1967) (reliance on racial classification invidious). See JM Balkin, "*Plessy*, *Brown*, and *Grutter*: A play in three acts" 26 Cardozo L Rev 2004-2005, 1689 for a much fuller account of the development of the doctrine. Balkin moots that a foreshadowing of the doctrine can even be detected as far back as 1819: *McCulloch v Maryland*, 17 US 316. However, his basic thesis is that the system of suspect classifications arose out of the New Deal (1933-36), which brought with it an increased involvement of the State in private citizens' lives.

[5] Case C-303/06 *S. Coleman v Attridge Law and Steve Law* [2008] ECR I-5603, at 5607 (Para. 7 of the Opinion).

recently in *Arcelor*[6], and Mazák AG in *Age Concern*[7]). Furthermore, a number of commentators on EU law have referenced the doctrine. These include McCrudden, whose recent reanalysis of the principle of equality[8], at least as far as concerns the first three of his four categories or approaches, has, in his own words, "echoes in the United States Fourteenth Amendment context"[9]. Martin believes that the Court is already using a type of strictness model, but calls for it to be tightened up, with both the suspect grounds and the levels of strictness properly classified.[10] Koen Lenaerts, an ECJ judge but writing academically, has linked the ECJ's indirect discrimination jurisprudence to the "suspect classification" approach of the Supreme Court[11]. Howard has also called for a version of the doctrine to be applied at the ECJ[12].

It is true that the objective justification stage of the Aristotelian test used by the ECJ *to some extent* mirrors the "strict scrutiny" technique pioneered in the US[13],

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[6] Case C-127/07 *Société Arcelor Atlantique et Lorraine and Others v Premier ministre, Ministre de l'Écologie et du Développement durable and Ministre de l'Économie, des Finances et de l'Industrie* (ECJ 16 December 2008), at Para. 31 et seq of the Opinion. Poiares Maduro avers here that the ECJ *does* use a suspect classification/ strict scrutiny approach, even if not in name.

[7] Case C-388/07 *Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* (ECJ 5 March 2009), at Para. 71 of the Opinion.

[8] To be found in C McCrudden, "Theorising European Equality Law" in C Costello and E Barry (eds), *Equality in Diversity* (Irish Centre for European Law, 2003) and also in C McCrudden, "The new concept of equality" (Paper prepared for the Academy of European Law conference, "Fight Against Discrimination: The Race and Framework Employment Directives" 2/6/03-3/6/03) <http://www.era.int/web/en/resources/5_2341_679_file_en.796.pdf> accessed 14 April 2009. See also supra, Chapter 2, n 2.

[9] C McCrudden and H Kountouros, "Human rights and European equality law" in Meenan (ed), *Equality Law in an Enlarged European Union* (CUP, Cambridge 2007) 74.

[10] D Martin, *Égalité et non-discrimination dans la jurisprudence communautaire: étude critique à la lumière d'une approche comparatiste* (Bruylant, Brussels 2006), 587 et seq.

[11] K Lenaerts, "L'égalité de traitement en droit communautaire: un principe unique aux apparences multiples" [1991] CDE 3, 14.

[12] E Howard, "The case for a considered hierarchy of discrimination grounds in EU law" 13 MJ 4 (2006), 445, 457-8 et seq. It is interesting to note her view that, of the Article 19 grounds, only sex, race, religion and sexual orientation should be classified as suspect; disability and age would be non-suspect.

[13] Although, according to Costello and Davies, in the gender discrimination context, the ECJ's scrutiny is strictest where *employers' practices* are concerned, and is weaker in the case of domestic legislation, and weaker still in the case of Community legislation! See C Costello and G Davies, "The case law of the Court of Justice in the field of sex equality since 2000" Common Market Law Review 2006, v. 43, n. 6, December, 1567, 1588. That "employer made" employment policies are scrutinized in a stricter manner than Member States' employment policies is confirmed by Schiek: D Schiek, "A New Framework on Equal Treatment of Persons in EC Law?" European Law Journal, v. 8, n. 2, June, 290, 297. Meanwhile, Hilson detects differences in the severity of the Court's review of laws and practices in the *free movement* field. He postulates, for example, that the ECJ employs stricter scrutiny in services cases than it does in establishment cases, and that the Court scrutinizes Member States' laws on, say,

allowing a discriminator (in theory, anyway) less and less scope to justify themselves, the more questionable the ground upon which they rely. This in turn should lead to a hierarchy of grounds (most strict to less strict, as it were), and some commentators believe they can see the formation of such a hierarchy in the ECJ's case-law: Martin and Warnier both insist, for example, that nationality discrimination is scrutinized in a stricter manner than gender discrimination (in other words, those discriminating on gender grounds will have their justifications more readily accepted by the Court than those discriminating on nationality grounds).[14] Others regard the Court's case-law as too haphazard for a hierarchy of grounds to be properly discerned, certainly when compared with that of the US Supreme Court. Iliopoulou makes the interesting point that altering the degree of strictness also alters the very definition of equality itself.[15]

Nevertheless, the allusion to the doctrine of suspect classifications in the title of this chapter is not to be taken as a definitive assertion that the ECJ has been using this doctrine in its equality case-law up till now, or as a call for it to do so in the future.[16] Rather it is used simply as a convenient way to distinguish the grounds so far considered – gender, race, religion, disability, age, sexual orientation and, in the particular context of the EU, nationality – with others which the legislature has not seen fit to single out and which the Court has therefore not regarded as requiring particularly heightened review. While the

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insurance "more leniently" than it scrutinizes laws on, say, tourism. See C Hilson, "Discrimination in Community free movement law" 1999 ELRev 24(5), 445, 461.

[14] Martin, supra n 10, 590; N Warnier, "Les discriminations directes and indirectes dans la domaine de l'égalité homme-femme et de l'égalité nationaux-non-nationaux" Revue de droit international et de droit comparé 2006, v 84, 2e trimester, 225, throughout, but see, for example, 285.

[15] A Iliopoulou, "Le principe d'égalité et de non-discrimination" in J-B Auby and J Dutheil de La Rochère (eds), *Droit administrative européen* (Bruylant, Brussels 2007) 448.

[16] Although it would perhaps be a step in the right direction. The doctrine of suspect classifications, via strict scrutiny, enables the Supreme Court to *look behind* the ostensible purpose of a law in order to tease out the real motive. In *Korematsu*, for example, the use of a racial criterion in the law in question triggered the need for strict scrutiny, which meant that the Court had to ascertain whether the law (which forbade US citizens of Japanese ancestry from being present in certain locations) was indeed aimed at meeting a "pressing public necessity", or whether it was merely an exercise in "racial antagonism" – see the quotation from the case set out in the text accompanying note 2 above. A Walzerian approach too would involve *looking behind* the distribution of rights of entry to certain locations, in order to see whether race was or was not part of the shared social meanings of such rights. Both methods, then, entail consideration of a much wider context than is contemplated by the Aristotelian test, which requires only a surface review of the two comparators, without need of further contextualization at all.

elderly, or the gay, or nationals residing in another Member State may have been

> *"subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness"*[17]

that the legislature and Court see the need to bestow on them "extraordinary protection"[18], persons and entities in "non-suspect" cases find themselves distinguished from other persons or entities on a ground which connotes neither historical subjection, nor political relegation. In fact, the cursory scrutiny given to such distinctions by the American courts is based on the *assumption* that the distinction in question will turn out to be merely

> *"the democratically fair outcome of struggles within the political process"*[19].

As Poiares Maduro AG has put it,

> *"[A]ll legislative activity entails choices and involves the redistribution of interests: in principle, although such choices and redistribution inevitably favour certain social and economic categories over others, they do not constitute discrimination and it is for the political process to discuss, define and determine the configuration of such redistribution."*[20]

However, just because a distribution proceeds from a ground which is viewed as non-suspect, does not mean that it is *automatically* legitimate, or, in Walzerian terms, just; it may still entail a boundary breach, and be in violation of complex equality. Nevertheless, this concept of non-discriminatory redistributions is important from a Walzerian perspective.

The waters are muddied slightly by the fact that the Treaty on the Functioning of the European Union does provide for a handful of *other* prohibitions on inequality, tailored to certain very specific situations or comparisons. The most important are Article 40(2) TFEU (ex Article 34(2) EC), prohibiting discrimination between producers and between consumers in the context of the Common Agricultural Policy, and Article 106 TFEU (ex Article 86(1) EC), requiring equal

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[17] *San Antonio School District v Rodríguez*, 411 US 1 (1973) at page 28.
[18] Ibid.
[19] Balkin, supra n 4, 1715.
[20] Case C-127/07 *Arcelor*, supra n 6, at Para. 33 of the Opinion.

treatment as between public and private undertakings.[21] Given, on the one hand, that the legislative draughtsperson saw fit to give these situations special mention, but, on the other hand, that the situations are very discreet and that the provisions concerned have to date generated relatively little case-law, it is proposed to refer to the grounds of comparison outlawed by these two Articles as "semi-suspect". They will be dealt with first.

6.2. Semi-suspect grounds

6.2.1. Article 40(2) TFEU: Producers and consumers

Within the context of the Common Agricultural Policy, perhaps the most contentious issue is the quota system – an attempt to cap supply of the various products, in the hope that this will drag the price downwards. This capping takes the form of an *additional levy* demanded, as a sanction, from all producers who have exceeded their quota (or "reference quantity"). Reference quantities for each Member State are fixed annually by the EU; it is then up to the individual Member State to divide the reference quantity between all of the national producers.

The quota system has generated case-law as long as it has existed. It is proposed to look at two cases – an older one from 1988, and a more recent one from 2000 – before briefly considering the two so-called *German Banana Cases*[22]. It is notable that the issues have hardly changed in twenty years.

[21] Article 55 TFEU (ex Article 294 EC), which requires Member States to accord equal rights to all participants in the capital of companies or firms, is arguably just a rarification of the prohibition on nationality discrimination in Article 18 TFEU (ex Article 12 EC), and will not be dealt with separately here. Other prohibitions on inequality, or requirements of equality, are to be found in secondary legislation, for example, the rule that all shareholders of a company "who are in the same position" must be treated equally, which is at Article 42 of Council Directive 77/91: Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [1977] OJ L26/1.

[22] Case C-280/93 *Federal Republic of Germany v Council of the European Union* [1994] ECR I-4973 – "German Banana Case (I)"; Case C-122/95 *Federal Republic of Germany v Council of the European Union* [1998] ECR I-973 – "German Banana Case (II)".

In *Erpelding*[23], a milk producer was granted an extra reference quantity by his Member State (Luxembourg), but brought an action because it had been calculated by reference to the period 1981-1983, instead of the period 1975-1979 as he had requested. He argued that his production had decreased between 1980 and 1983 due to an outbreak of mastitis, and again at the end of 1983 due to Canadian flu; it had since risen again. But a low reference quantity meant that he could produce less milk before incurring the additional levy, which meant lower profits. Was he being treated unfairly by comparison with a producer who had done *well* between 1981 and 1983?

Advocate General Darmon did not think so, and the Court agreed. Darmon foresaw grave consequences if producers were accorded a wide choice of reference year:

> *"[T]here is a risk that producers would choose a reference year which was not merely unrepresentative but which would ultimately reveal a truly remarkable yield. Given the number of Community producers such a consequence could not be regarded as negligible."*[24]

The Court held that this *was* an instance of comparable situations being treated in a different manner, but that it was objectively justified by, firstly, the need for legal certainty, and secondly, the need to preserve the effectiveness of the system. Thus, there was no breach of Article 40(3) EC[25].

A complex egalitarian, on the other hand, almost certainly *would* have found a breach. This case is in some ways a *classic* boundary breach: one producer having his success in, say, 1983 converted into success in the distribution of quotas, and one producer having his *failure* in 1983 converted into *failure* in the quota-distribution. It was surely open to Mr Erpelding to argue that the fact of having done well (or badly) in 1983 was not germane to the sphere of quota-distribution – it was a sphere unto itself – and those whose performance had been poor in 1983 should not have to wear this like a mill-stone round their necks, the failure iterated and reiterated in all subsequent spheres from then onwards. On the other hand, perhaps success or failure in 1983 *was* the correct

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[23] Case 84/87 *Marcel Erpelding v Secrétaire d'État à l'Agriculture et à la Viticulture* [1988] ECR 2647.

[24] Ibid., at 2662 (Para. 13 of the Opinion).

[25] This was the old, pre-Amsterdam numbering for Article 34(2) EC, which, since the coming into force of the Treaty of Lisbon, is now Article 40(2) TFEU.

distributive principle, as agreed by all concerned parties. It would depend on what said parties understood to be the *meaning* of a quota. Was it a prize, to be awarded for good work in the past?[26] Or was it part of an effort to safeguard the entire milk-production industry by reducing surplus? It *is* logical that a producer's (future) limit should be in some way related to his (past) capacity. But why should a producer be *forced* to have his limit calculated on the basis of a reference year which was not a true reflection, for him, and for genuine reasons, of his past capacity? It is at least arguable that Luxembourg's mechanical use of the period 1981-1983 here[27] was a boundary breach, and led to the artificial (and quite unnecessary) creation of a dominant. Besides, subject to the decision of the distributive community, the correct fundamentum distributionis would seem to be propensity for good (or bad) performance *in the future*; past performance is only one element which indicates that.[28]

In the 2000 case of *Kjell Karlsson and others*[29], a number of Swedish milk producers were also unhappy with their individual reference quantities. Towards the end of 1995, Sweden had decided to pass a law making a number of changes to the arrangements for the distribution of quotas obtaining up until then. For this purpose, it divided the distributees into four categories: milk producers whose production had not increased between 1991 and 1993, milk producers whose production *had* increased, so-called "ecological" milk producers (that is, those producing organic milk), and new producers. In relation to the members of the second category, that is, those who had increased their production, Sweden decided to increase their so-called "own-risk deduction".

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[26] Contrast a case like *Gascogne Limousin Viandes*, where the issue was whether it was a breach of the principle of equal treatment for one Member State to receive an early marketing premium, while another did not. Here, it is quite obvious that *the premium rewards effort* (in reducing the slaughter-weight of calves), so that it is just for a Member State which has put in the requisite effort to reap the requisite reward, and vice versa. The breeding of the calves and the distribution of the premium are still two separate spheres, but for the King of the one to rule in the other is not a boundary breach – it is a legitimate crossing; the calves are *part of the meaning of* the premium. (The Court was also of the view that there was no discrimination.) See Case C-56/99 *Gascogne Limousin viandes SA v Office national interprofessionnel des viandes de l'élevage et de l'aviculture (Ofival)* [2000] ECR I-3079.

[27] Although effectively dictated by the Community institutions. Note also that the governing Regulation did provide for some situations where alternative reference years *could* be used, but that none of these availed Mr Erpelding: Commission Regulation (EEC) No 1371/84 of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 [1984] OJ L132/11, Article 3.

[28] *Erpelding* also touches on the important topic of *luck*. This aspect of the case will be discussed below, at section 6.4.

[29] Case C-292/97 *Kjell Karlsson and Others* [2000] ECR I-2737.

This meant, for example in the case of Mr Karlsson himself, that a reference quantity of roughly 48,500 kg was to be reduced by 55%, instead of the earlier 25%. A similar increase was imposed on members of the fourth category (new producers), whose quotas were to be reduced by 30% instead of 15%. Meanwhile, the new law made no change at all to the arrangements for producers whose production had stayed the same, and ecological producers even received benefits. Mr Karlsson and two others brought an action, claiming that several aspects of the new law breached the principle of equality in Article 34(2) EC (now Article 40(2) TFEU), in particular the differential treatment as between the second and fourth categories and the first and third categories, and the differential treatment as between the second category and the fourth category themselves.

Advocate General Colomer found nothing wrong with Sweden's law, and any inequalities that there were were objectively justified. The Court seemed to be of exactly the same opinion.

Applying Walzer's theory to the case, it would be entirely up to the distributive community whether the handling of each type of producer was or was not consistent with the meaning of the milk quota system. Was it just to grant new producers such small quotas, for example? Perhaps this served the purpose of trying to disincentivize newcomers, and perhaps, in an industry with chronic over-production, that would be a distributive criterion which would be met with approval by the wider community. It must be remembered that, under Walzer's theory of membership, members of a sphere have the exclusive power to decide who can or cannot join them[30]. Meanwhile, was it just to *reward* the ecological producers? It seems fairly uncontroversial that those who make efforts towards the protection of the environment, for example, by cutting back on the use of pesticides, should be rewarded, but, again, it would be up to the distributive community. Neither of these categories, though, seems to have received treatment out of keeping with the industry under discussion, as understood by those who participate in it.

[30] "[W]e who are already members do the choosing, in accordance with our own understanding of what membership means in our community and of what sort of a community we want to have": M Walzer, *Spheres of Justice – A Defense of Pluralism and Equality* (Basic Books, New York 1983) 32.

Turning to the producers whose production had remained unchanged over the period 1991-1993, this category raises the same question as that already discussed in *Erpelding*, namely whether past performance was or was not part of the meaning of a quota. Of course the final decision would be the community's, but certainly there is some scope for the finding of a boundary breach here.[31] Furthermore, turning from those whose performance was merely steady to those who actually managed to bring about an *increase* in production, it is striking to note that good performance in *Karlsson* is actually *penalized*, in contrast to *Erpelding*, where past success was the (potentially dominant) pass-key to a higher quota going forward. As usual, it would be the wider community's job to decide if it endorsed this distributive principle, which certainly seems unfair on the face of it. Perhaps it could be explained away as a kind of sanction for contributing, as the community saw it, to the glut in milk, which put everyone at risk. However, if Mr Karlsson had invested money in order to make improvements on his farm[32], it is particularly cruel to hamper his recouping of it. Past success in *this* case, then, would appear to be acting as a *negative* dominant.[33]

Staying on the topic of quotas, it is instructive to look at the two so-called *German Banana Cases*[34]. The second of these provides a rare example of the situation where the Court saw a distinction which the complex egalitarian might *not* see, or at least might not regard as a breach. The first case is the less interesting of the two, from the Walzerian viewpoint. Here, tariff quotas were subdivided in favour of importers of Community or ACP bananas[35]. This meant that importers of this type received a larger quota, and could then import a larger quantity of bananas without incurring a penalty. Germany, which tended to

[31] In theory, anyway. Perhaps in practice, though, the members of this category would not feel particularly hard-done-by, as their position vis-à-vis the distribution had not altered; they might not therefore feel a great need to complain of inequality in the first place.
[32] The Advocate General implies that he had bought five new cows: Case C-292/97 *Karlsson*, supra n 29, at 2741 (Para. 12 of the Opinion).
[33] This case also touches on the issue of luck. That aspect of the case has not been mentioned here, but will be discussed at section 6.4. below. Analysis of another Article 40(2) case, *Frico*, will similarly be postponed until section 6.4: Joined cases 424/85 and 425/85 *Coöperatieve Melkproducentenbedrijven Noord-Nederland BA ("Frico") and others v Voedselvoorzienings In- en Verkoopbureau* [1987] ECR 2755.
[34] Case C-280/93 *German Banana Case (I)* and Case C-122/95 *German Banana Case (II)*, supra n 22.
[35] "ACP" is the shorthand name for the African, Caribbean and Pacific countries with which the EU has a special agreement.

import "third country" bananas[36], and was then subject to a much harsher regime with much lower quotas, brought an action against the Council alleging a breach of the principle of equal treatment. The Court rejected the complaint, saying that the differential treatment was part and parcel of market-integration (another example of inequality being used to justify itself).

A complex egalitarian would of course invoke the Standard Contingent Reply; it is up to the members of the distributive community how they allot tariff quotas (and, indirectly, market share) amongst themselves. If Germany is unhappy, it must simply await the next meeting of the forum to express its view and lobby for change. Prima facie, though, it does not seem to be contrary to the meaning of a tariff quota system to exclude or at least impede countries which are outside the protected bloc.

In the second case, certain additional banana-producing countries were accorded preferred-nation privileges and duty-free access to the Community[37], *but only* if the importing operator *customarily* marketed Community and/or "traditional" ACP bananas. If the operator had previously marketed third country or "non-traditional" ACP bananas, or if they had started marketing third country or "non-traditional" ACP bananas since 1992, then they had to purchase costly export and import certificates, and pay duty on the incoming fruit. Again, Germany complained. In a judgment which was noteworthy for the way in which the Court was prepared to intervene in matters that were technically external to the Union, the ECJ this time upheld Germany's complaint; there had been no need to penalize the latter two categories of operator and to do so was therefore discrimination.

Utilizing a Walzerian form of reference, there would appear to be a connection between an operator's choice of exporter on the one hand, and the distribution of (the obligation to buy) export certificates on the other. This would mean that there was no boundary breach here. The disparate treatment as between the first category of operator and the second two categories of operator was merely a "small inequality". In other words, a complex egalitarian would probably reach the same decision as was reached in the first case. If Germany was unhappy

[36] I.e. bananas that were neither from other Community countries, nor from ACP countries.
[37] These new countries were to be known as the *non-traditional* ACP countries, to contrast them with the *traditional* ACP countries.

with the current arrangement, it could campaign for a new "shared meaning" of an export certificate at the next forum. As things stood, however, the distributive criterion being used did not appear to be out of keeping with the meaning of the distribuend at hand, and thus did not violate complex equality.

6.2.2. Article 106(1) TFEU: Public and private undertakings

Given that the entire goal of Article 106(1) TFEU (ex Article 86(1) EC) is to prevent Member States from distorting competition by using their greater resources to outdo private undertakings – what might be called legislative boundary defence – the simple egalitarian will usually find himself on the same side as the complex egalitarian where this article is concerned. A straightforward example would be *Asociación Profesional de Empresas de Reparto*[38], where the Court held Spain to be in breach of Article 86(1) EC for having entrusted to the wholly State-owned post office (Correos) not only permissible "reserved" services, but also the non-reserved services, and without having issued a call for tenders. A complex egalitarian too would find against Spain here; the distribution of the non-reserved services was quite obviously flawed in favour of the public undertaking, with all of its State resources and backing, thus leaving any rival private undertakings with no hope of acquiring this work, and, it would seem, not even the chance to express their interest.

However, more interesting cases, where a Walzerian analysis might produce a contrary result, may still be found.

In *Assurances de Crédit*[39], two Belgian insurance companies found their return considerably reduced thanks to a new obligation, imposed by the Community via Council Directive, to set up an "equalization reserve" (apparently to safeguard their solvency). In bringing an action, the applicants alleged a breach of the principle of equal treatment – insurance undertakings in the public sector were excluded from the scope of the Directive. The Advocate General thought that this was a case of like (economic operators) being treated unlike, and, having

[38] Case C-220/06 *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado* [2007] ECR I-12175.
[39] Case C-63/89 *Les Assurances du Crédit SA and Compagnie Belge d'Assurance Crédit SA v Council of the European Communities and Commission of the European Communities* [1991] ECR I-1799.

rejected both of the proffered justifications, he found there to have been a breach of Article 86(1) EC (now Article 106(1) TFEU). The Court, so far as can be made out, took the situation to be one of unlikes being treated unlike; public undertakings were in an "objectively different situation"[40], and therefore there was no discrimination.

On the face of things, the private undertakings' private status does seem to be something of a negative dominant here, a badge of dishonour causing them to be encumbered with burdens not imposed on holders of other badges. On the other hand, perhaps the obligation to set up the reserve has been justly distributed in this case. Whether a company is public or private might be the correct fundamentum distributionis; it could be argued that public companies do not need to put up the extra security because State ownership is already a sound enough guarantee.[41] As usual, the Standard Contingent Reply would come into play, as the verdict of the distributive community itself is awaited. However, it is at least conceivable that whether or not a company is State-backed might be part of the meaning of an obligation to establish financial guarantees for the protection of the insured, and third parties. A second argument proffered by the defendant institutions, meanwhile, namely that they could not include public insurance companies in the Directive because they are too diverse, would almost certainly not stand up to Walzerian scrutiny. It is not at all clear how belonging to a category of companies wherein the members are homogeneous, or belonging to a category of companies wherein the members are heterogeneous, has anything to do with protecting the insured (and third parties) from loss of solvency on the part of their insurer.

In *Acoset*[42], the Sicilian Regional Province of Ragusa, its Conference of Mayors, and twelve municipal councils of South-East Sicily, established a body which was to be responsible for Regusa's integrated water supply. This body then selected, as its form of management, a "semi-private company with share capital which is predominantly publicly owned"[43]. At this point, a competition was held to select the private participant for this company, which Acoset won fairly; it was

[40] Ibid., para. 22.
[41] Plus, as is pointed out a number of times in the Opinion and in the Judgment, the setting up, by the State, of a reserve for State-owned companies might well violate the rules on State Aid.
[42] Case C-196/08 *Acoset SpA v Conferenza Sindaci e Presidenza Prov. Reg. ATO Idrico Ragusa and Others* (ECJ 15 October 2009).
[43] Ibid., para. 17.

clear from the contract notice that many of the works relating to the exclusive management of the water service would be the direct responsibility of the winning private participant, without need of further tendering procedures. However, a dispute then arose as to whether this process was compatible with EC law, and a reference was made.

The Court and the Advocate General were unanimous that the process had indeed been correct. There was no need for two tendering procedures, one to select the private participant and another to award the service concession itself. Such a "double competitive tendering procedure"[44] would be a disincentive for private entities to come forward in the first place. Rather,

> *"the selection of the concessionaire can be regarded as an indirect result of the selection of [the] participant […], so that a second competitive tendering procedure for the selection of the concessionaire is unnecessary."*[45]

Seen through complex egalitarian eyes, this case provides a neat example of the importance of defining the sphere or spheres at issue. Technically, there are two distributions at play here: the distribution of the chance to participate in the public-private partnership, and the distribution of the management of the water service. The Court opted to kaleidoscope the two into one: the distribution of the chance to participate in a public-private company which would then manage the water service. If this approach is followed, and all the inhabitants of the resultant single sphere acquiesce, then it would appear that Acoset's fair winning of the "first" (and now only) tender would be just. However, if the inhabitants insisted that the two distributions be kept apart, then two boundary breaches are immediately apparent. Firstly, the "winner" in the first distributive sphere can smuggle this win into the second distributive sphere, in order to claim automatic victory there as well. Secondly, and perhaps more importantly, the public sector would be able to muscle in on the management of the water service, since, whichever private entity won in the first sphere, its (the public sector's) own participation in the project was guaranteed. The public sector does not do everything better than the private sector, as a matter of course, and so it is not at all cut-and-dried that the new partnership would deliver a better water service than one of the *other* private entities, working *alone*.

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[44] Ibid., para. 58.

[45] Ibid., para. 60. Assuming of course that the first competitive tendering procedure had been conducted in accordance with the principles of EC law.

6.3. Non-suspect grounds

6.3.1. General introduction: *Omega*

The non-suspect ground cases are the last stop in this case study. Certain sub-categories can be identified, and three of these, public procurement, human resources and competition law, will be considered below. However, aside from these, the list of non-suspect grounds is non-exhaustive, and the number of cases is potentially infinite, encompassing every possible difference between all possible entities. That said, even the most minute and seemingly trivial difference may make a large difference to an applicant, even the difference between solvency and bankruptcy. As an illustration of this, it is proposed to start by looking at the *Omega* case where a company's aeroplanes were discriminated against by the Council by reason of their low by-pass ratios.[46]

In 1999, legislation was passed at Community level to address the problem of the noise pollution caused by commercial aeroplanes; aeroplanes the engines of which had a by-pass ratio of lower than three were to be prohibited. The new law did not affect new planes, which were all built to the new specifications anyway. However, Omega was now prevented from using a number of older planes which it had refitted with newly manufactured engines, producing a by-pass ratio of 1.74. The company brought an action against the authorities in its home Member State (the UK), in an attempt to have the legislation annulled. Before the European Court, on a reference from London, it insisted that the by-pass ratio was not the only indicator of engine noise, and that its refitted planes were in fact slightly quieter than those with engines the by-pass ratio of which was three or more. A first comparison, then, was between Omega's re-engined aeroplanes, and those complying letter-for-letter with the new law. If Omega objected to being treated differently from companies in compliance with the Regulation, it also objected to being treated *the same as* companies which had

[46] Joined cases C-27/00 and C-122/00 *The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd (C-27/00) and Omega Air Ltd , Aero Engines Ireland Ltd and Omega Aviation Services Ltd v Irish Aviation Authority (C-122/00)* [2002] ECR I-2569.

merely refitted their aeroplanes with so-called “hush-kits” (a far inferior response to the problem, according to Omega); this, then, was the second comparison.

However, neither the Advocate General nor the Court found there to have been a breach of the principle of non-discrimination. Alber AG was of the opinion, in relation to the first comparison, that Omega and companies producing new, Regulation-compliant planes could not be regarded as alike, especially considering that the latter had to be able to rely on their legitimate expectations that the new regime would be adhered to; in this way, unlikes were being treated unlike. The Court, meanwhile, preferred to see the situation as one of *likes* treated unlike, but with legitimate expectations acting as an *objective justification* for the unlike treatment. With regard to the second comparison, the Advocate General seemed to be saying that, despite the fact that they were different, the two comparators were the same – likes had therefore been treated alike. The Court reached the same conclusion. It can be seen, once again, how Aristotelian analysis tends to produce inconsistent or nonsensical results.

A Walzerian analysis, on the other hand, would be relatively straight-forward. What is being distributed is restrictions on the use of aeroplanes at European airports, “in the interests of protection against noise”[47]. The companies producing all three types of plane – planes reengined with engines having a low by-pass ratio, planes refitted with hush-kits, and new planes the engines of which had a by-pass ratio exceeding three – are the distributees. On the face of it, the distribution would seem to be flawed in favour of companies producing aeroplanes of the first two types. Companies producing aeroplanes of the third type seem to be immune from restriction, as though their aeroplanes’ very newness was a dominant[48]. However, it would as usual depend on the distributive community’s understanding of these anti-noise restrictions. If newness formed part of the understanding then bringing newness into the distributive sphere would be a legitimate crossing, not a boundary breach. Yet there seems to be no reason why those living near airports should not be allowed into the forum as recipients of, if not the main distribuend, then an important by-product: peace and quiet. They might not care about the method

[47] Ibid., at 2572 (Para. 1 of the Opinion).

[48] In this case, a negative dominant. If the distribution were viewed the other way around, for example, if the distribuend was read as being “permission to fly”, then newness would be a *positive* dominant.

by which a reduction in noise was achieved. Their distributive criterion might simply be: those with the noisiest engines should receive the most restrictions. Did the Council draw up its thresholds in consultation with them? If they agreed, for example, that "on take-off there would be no perceivable difference"[49], and judged that to be the decisive factor, then Omega's planes should also have been exonerated and restrictions needed only be issued for planes refitted with hush-kits.

The danger is that the "by-pass ratio of three" is simply a line in the sand, mechanically applied by the Council and converted (also in the Walzerian sense) into a legislative death sentence for a company like Omega. One might hope that the ECJ judges, whose job it is to curb the excesses of the legislature, might take a fresh approach. But the yes-no simplicity of the Aristotelian test enables them (or forces them, depending on their viewpoint) to merely rubber-stamp the Council's choice. This represents a jackpot for a company producing new planes, as the Council *qua* distributor bestows it with dominance, and the Court, unwilling or unable to make its own *de novo* assessment, is little more than a messenger-boy.

6.3.2. Public Procurement

One context in which the principle of equal treatment is regularly invoked is that of public tendering procedures; an example has already been seen earlier with *Acoset*[50]. In *Acoset*, however, one bidder was contesting the procedure itself, whereas more usually the issue is whether two bidders have had an equal chance. In *Evropaiki Dynamiki*[51], for example, the Commission launched a tendering procedure in early 2002 for the provision of support services in relation to CORDIS (an informatics tool for European research framework programmes); here services had been provided up until then by the existing contractor, Intrasoft International SA. Evropaiki Dynamiki ("ED") submitted a tender but ultimately failed, the contract instead going to a company called Trasys which had made clear from the outset its intention, if successful, to subcontract at least 35% of the work to the existing contractor. ED challenged this result on a

[49] Joined cases C-27/00 and C-122/00 *Omega*, supra n 46, at 2590 (Para. 75 of the Opinion).
[50] See supra, text accompanying n 42.
[51] Case T-345/03 *Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission of the European Communities* [2008] ECR II-341.

number of grounds, of which the most important two were, firstly, that the running-in phase was to be unpaid (which put a burden on everyone except the existing contractor), and secondly, that the Commission had initially failed to give out certain technical information (so that the only party who had this information from the beginning was the existing contractor).

The Court of First Instance rejected the first of these pleas; the fact that an unpaid running-in period disadvantaged all but the incumbent was not the Commission's fault – it was merely, for the existing contractor, an "inherent de facto advantage"[52]. Turning to the second plea, this was itself divided into two parts: the Commission's alleged failure to inform the bidders that it had recently acquired the so-called "Autonomy Software", and the Commission's alleged failure to provide information regarding certain technical specifications and source codes for CORDIS. With regard to the first of these, the Court thought that there had been a procedural defect, but that it could not have made any difference to the tendering procedure; in other words, knowledge of the acquisition of the Autonomy Software was irrelevant anyway. With respect to the second, a similar result seemed to have been reached – that there had been a defect but that ED failed on causation – except for the argument that, had it had the pertinent source codes and so on, ED's actual bid would have been lower. The Court accepted this argument; in its opinion, if it had had the source code information on time, ED would have tendered a lower price and thus would have fared much better in the competition. The Commission's decision was therefore annulled.

An illegitimate boundary crossing would most probably be the verdict of a complex egalitarian reading this case. In fact, it is a classic boundary breach for Intrasoft/ Trasys to bring "inside" knowledge, gained in a different sphere, into the distributive sphere at issue (the tendering procedure) and thereby swing the distribution in their favour. Only if all candidates had been given the information[53] would it lose its status as a monopolizable dominant and become simply part of the shared understanding of the procedure; in other words, only

[52] Ibid., para. 70. Note how the CFI entertains here the Walzerian idea of the *small inequality*.
[53] Or, more properly, "had been given an equal chance to learn the information". Those who ignored it, or misunderstood it, or applied it wrongly, would not be treated unjustly if not selected.

then would the crossing be legitimate. The outcome for the complex egalitarian would thus have been the same as that arrived at by the Court.

However, on occasion, a different result may be reached. In *Centro Studi*[54], the Council issued a tendering procedure for the full management of a crèche. Centro Studi Antonio Manieri Srl ("Centro Studi"), an Italian company, was accepted as a candidate for the procedure, and submitted its tender at the beginning of 2005. However, on 16 January 2006 the General Secretary notified Centro Studi by letter that he was abandoning the tendering procedure, and announced his decision to accept the proposal of the so-called Office for Infrastructure and Logistics (OIB), which formed part of the General Secretariat. Centro Studi brought an action consisting of several pleas, one of which was that the Council had breached the principle of equal treatment by evaluating the OIB's proposal independently of the tendering procedure. In its judgment, the Court of First Instance reiterated that tendering procedures were only obligatory where a contracting authority was intending to hire a supplier of assets or provider of services from outside of its own organization, not where the would-be contractor was one of its own departments. In the CFI's view, because the OIB was a department of one of the Community institutions, it could not be compared to participants in a tendering procedure. Therefore, the Council's separate evaluating of its proposal was not an infringement of the principle of equal treatment. The action was dismissed.[55]

A supporter of complex equality would ask what the shared social meaning or understanding of the distribuend was. The work on offer, namely managing the Council's crèche, was surely above all else about the looking after of children.[56] From this meaning, the fundamentum distributionis would appear to be the ability to look after children, that is, whoever could best look after children should receive the contract. The automatic allocation of the work to the OIB, then, whether or not a department of an institution, would now seem to be flawed. The OIB had been allowed to use its connection to the Council as a "master good", which it could exploit to tyrannize neighbouring distributive spheres, in

[54] Case T-125/06 *Centro Studi Antonio Manieri Srl v Council of the European Union* (CFI 28 January 2009).
[55] Note that a plea made by Centro Studi on the basis of Article 106 TFEU (ex Article 86 EC) was also rejected because, while Centro Studi was a private undertaking, the OIB was *not* a public undertaking.
[56] Taking the Standard Contingent Reply as read.

violation of complex equality. Thus a supporter of the theory would reach the opposite result to the one reached by the Court.

6.3.3. Human Resources

Another area in which it is commonplace to find allegations of unequal treatment is that of human resources, including the so-called "staff cases". However, in addition to the individual staff-members of the European institutions bringing actions against their employers, action is sometimes taken on an even larger scale, for example, when Italy sued the Commission for having decided to advertise vacancies in English, French and German only[57]. The Court of First Instance held that, in a given competition, persons holding two of the excluded languages (knowledge of at least two languages being the minimum requirement for work at one of the European institutions), but who were nevertheless eligible for the post, would have no way to acquaint themselves with the vacancy notice, and would then be in a "less advantageous position"[58] in relation to other candidates. This was discrimination on grounds of language. The Commission's decision was annulled.

A Walzerian student of this case would almost definitely agree with the Court, concluding that a candidate's *choice* to have learnt English, French or German, or *characteristic* of knowing English, French or German[59], was exploitable here as a means of gaining privileged access to a separate sphere, where mastery of those three languages was not part of the meaning of (the possibility of) the post in question.[60] Such spherical imperialism would represent a breach of complex equality.

[57] Case T-185/05 *Italian Republic v Commission of the European Communities* (CFI 20 November 2008).
[58] Ibid., para. 136.
[59] The analysis works in either event. See supra section 3.3.
[60] Taking the Standard Contingent Reply as read. Of course, the situation would be different where *the post itself* was reserved for those knowing two or all of the three languages mentioned. Then mastery of the languages *would* be part of the meaning of the distribuend, thus legitimizing the boundary crossing.

In many cases, officials of the European institutions complain of a perceived unfairness with regard to their pay, or other benefits. In *Beltrante v Council*[61], for example, the parents of various adult children, who for whatever reason were to be "treated as if they were dependent children", complained when travel expenses in respect of such children were scrapped, unless the child lived in the same city as the official. This created an inconsistency with the parents of dependent children *strictu sensu*, who could receive travel expenses for their children even where the child did *not* live in the same city as the official.

In its judgment, the Court of First Instance demonstrated once again the illogical nature of the Aristotelian equality test. First, it seemed to hold that the two categories of parent were alike, but that their unlike treatment was objectively justified[62]. However, in the next paragraph, it states clearly that the situation is one of *unlikes* treated unlike.[63] In either case, the objective justification (version one) or differing circumstances (version two) come to the same thing – the Court is of the belief that dependent children *strictu sensu* are "part of the family unit"[64] and give rise to a presumption of cohabitation, while children "treated as if they were dependent children" are "members of the family only in the broad sense"[65]. This presumably means that a parent of the former type of child needs to be recompensed, if the child lives in a different place, for the rupture to the family circle caused by his or her work; but for the job, they would have enjoyed a greater amount of familial warmth because all members of the family would have been in the same place. The parent of the quasi-dependent child, apparently, is not expected to miss their absent offspring.

Again, the test is seen to be too black-and-white. It is true that in some circumstances the parents of children "treated as if they were dependent children" – adult children without gainful employment, for instance – might not feel any especial need to have said children come and visit. But in other circumstances – where the adult child is disabled, say – the Court's ruling seems unduly harsh and uncaring. A further criticism would be that, from the linguistic point-of-view, it seems particularly absurd to define a certain type of

[61] Case T-48/89 *Fernando Beltrante and others v Council of the European Communities* [1990] ECR II-493.
[62] Ibid., para. 33.
[63] Ibid., para. 34.
[64] Ibid.
[65] Ibid.

children, in the Staff Regulations themselves, as "treated as dependent children", and then, when asked, to declare that these same children, defined thus, are *not* to be treated as dependent children.

A Walzerian dissection of the case avoids all of these pitfalls. There is a single, autonomous distributive sphere. Travel expenses are being distributed, by the Council, to various types of official. Prima facie, whether an official's children are dependent *strictu sensu* or "treated as if dependent" is *not* part of the meaning of travel expenses, and for the Council to use one or other of these attributes as a (positive or negative) dominant would appear to be a boundary breach. On the other hand, it would be open to the distributive community to legitimate such a border-crossing by incorporating one or both of the attributes into its shared meaning of the benefit in question.

6.3.4. Competition Law

Another field in which equality pleas are popular is that of competition law, where, after a number of undertakings have been found guilty of a competition offence, there are sometimes allegations that differing levels of liability amongst the culprits have not been adequately reflected, by the Commission, in its imposition of sanctions.

In the ECJ case of *Weig v Commission*[66], for example, the applicant company was one of nineteen producers of cartonboard in the Community to be fined by the Commission for infringement of Article 81 EC (now Article 101 TFEU), in other words, for participation in a cartel. Having obtained only a slight reduction in its fine from the Court of First Instance, Weig proceeded to the ECJ, where it claimed unequal treatment as between it and three other cartel-members. These three undertakings, along with Weig, had been recognized as having taken a lesser role in the infringement. However, while the other three had been so recognized *earlier*, and therefore had received a lower fine in accordance with the *Commission's* formula, Weig was not so recognized until its appearance before the CFI, meaning that it had received a lower fine in accordance with the

[66] Case T-317/94 *Moritz J. Weig GmbH & Co. KG v Commission of the European Communities* [1998] ECR II-1235; on appeal Case C-280/98 P *Moritz J. Weig GmbH & Co. KG v Commission of the European Communities* [2000] ECR I-9757.

CFI's *own* method of calculation. The ECJ upheld this argument – Weig had been treated in an unlike fashion.

However, viewed through a Walzerian lens, the case in some ways resembles the second German banana case, discussed above[67]. All four undertakings are legitimately within what might be called the "punishment sphere". They all bring their earlier behaviour or, more importantly, *responsibility*, with them, but that is not (on this occasion, anyway) a boundary breach; the two spheres are intimately related, the second designed to follow the first, with the result that any crossing from the one to the other is perfectly legitimate. It is part of the shared meaning of a fine[68] that it is allotted – indeed, *only* allotted – to those who have, in the past, behaved in a certain way. But surely Weig is entitled to complain that, for the same offence, the distribution of punishments should also be the same? Indeed it is, but such discussion is for the forum; it is up to the members of the distributive community as a whole to decide, amongst themselves, what the shared meaning of this particular sanction is, and therefore how it should be distributed. The inequality being argued over is, at worst, a *small inequality*; no actual boundary has been breached.[69]

6.4. Luck: Boundary breach or small inequality?

There is a certain type of equality case wherein it is difficult (for the complex egalitarian) to tell if a boundary has been crossed. Or put another way, there is a certain type of *inequality* which it is hard to categorize as either a small inequality or the result of a boundary breach. This is inequality caused by luck. Luck is not often seen in the suspect grounds, where, usually, a great deal of deliberation has gone into the production of the inequality. However, it appears quite regularly in the semi-suspect and non-suspect cases. Just for the sake of

[67] See supra, text accompanying n 34.
[68] Taking the Standard Contingent Reply as read.
[69] Space prohibits further examples, but other competition cases where equality was at issue include: Case T-21/99 *Dansk Rørindustri A/S v Commission of the European Communities* [2002] ECR II-1681; Case T-354/94 *Stora Kopparbergs Bergslags AB v Commission of the European Communities* [2002] ECR II-843; Case C-291/98 P *Sarrió SA v Commission of the European Communities* [2000] ECR I-9991; Case T-308/94 *Cascades SA v Commission of the European Communities* [2002] ECR II-813; Case T-86/95 *Compagnie générale maritime and Others v Commission of the European Communities* [2002] ECR II-1011.

completeness, then, it is proposed to consider briefly the concept of luck as it applies or might apply to cases coming before the ECJ.

In *Frico*[70], an agricultural case under Article 40(3) EC[71], butter-manufacturers from different Member States found themselves in different situations as a result of varying interest rates. Specifically, the national intervention agencies afforded their domestic butter-manufacturers financing to enable them to store surplus butter, or at least to recoup the costs of past storage. In the UK, payments were made with a 9.5% interest rate, while in Germany and the Netherlands, payments were made with a 7% interest rate. Frico, a Dutch butter-manufacturer, was concerned that rivals in a high-interest Member State might obtain loans in a low-interest Member State, so that when they were reimbursed they would actually make a profit; it therefore called for a uniform reimbursement rate of 7%. The Court was unsympathetic, holding that any such move by rivals was "offset by the risk, to which that practice exposes them, that the exchange rates of those currencies might change to their detriment"[72], and that the purpose of the scheme was to provide compensation for storage costs, not to improve competitiveness.

From the point of view of complex equality, the arrangements with regard to the interest rate or rates used in the calculation of the repayments would certainly seem to be a matter for the distributive community. All of the national intervention agencies, the Commission (which issued the pertinent regulation), and the butter-manufacturers, would have to decide between them how they wished the reimbursement payments to be worked out. However, assuming that something like the extant arrangement was arrived at, it is still a matter of *luck* for Frico if the interest rate in its (low-interest) Member State falls to a point where it would become profitable (taking into account bank charges and so on) for a rival in a high-interest Member State to cross the border to obtain its financing. The rate is set in a different sphere by the national bank of the Netherlands[73]. But then the same could be said, mutatis mutandis, for the rival. A UK company, for example, would be dependent for its rate on the Bank of

[70] Joined cases 424/85 and 425/85 *Frico*, supra n 33.
[71] This was the old numbering for Article 34(2) EC, which, since the coming into force of the Treaty of Lisbon, is now Article 40(2) TFEU.
[72] Ibid., para. 14.
[73] Obviously the case, referred to the Court in 1985, predates the introduction of the euro, although if the rival is in the UK, inter-currency speculation would still be possible today.

England. The "national rate" cannot be a monopolizable dominant if everyone has one!

The solution arrived at, for the purposes of this dissertation at least, is to distinguish between the luck occurring at the moment of distribution (which will be referred to, simply for linguistic ease, as "today's luck"), and luck occurring in the past ("historical luck"); this seems the best resolution to the problem, and the most in keeping with Walzer's theory in general. The coin-toss at the beginning of the first football match of the season will determine which team plays in which direction, in the first and second halves, *that day*. Noone would seriously suggest that it was unjust. And so, technically, the same, perfectly fair coin-toss could be used to determine the same matter *for every game of the season*; why bother with another at the beginning of the subsequent games? Fortuna has spoken, and that should be that. However, the more time passes, the more the team that first plays, say, left to right, can come to rely on this as an entrenched right. On a day when the sun would be shining particularly harshly on the team first playing right to left, the latter team may decide simply to default, without playing at all. The other team has now brought the result of the original coin-toss with it into the changing rooms, and used it to claim instant victory. In other words, over time, it has *become* a dominant. Clearly a coin-toss at the beginning of every game is fairer. It is still only luck which decides, but something about today's luck is special. It is a new day and a new match; a new appeal to Fortuna is called for. In Walzerian terms, the new day is like *a new sphere*.

The meaning of this for those attempting to use the theory in practice is reasonably straight-forward. In no situation, and therefore in no distribution, can every eventuality be planned for and regulated. Something is always "left to chance". Everyone is equally affected by that "chance", whether it manifests itself on that particular day positively or negatively, or differently for different people. Everyone accepts it as an unavoidable risk inherent in human life.[74]

[74] Although there are of course some philosophers, such as Dworkin, who do wish, if not to avoid luck altogether (of the type that he calls *brute luck*), then at least to mitigate its effects via compensation for the unlucky. Rakowski has developed an entire *theory of equality of fortune*: "[O]nly by eliminating unsolicited good and bad fortune from the forces shaping people's holdings can true equality of station be attained, and the distribution of resources be made acceptable to a community of persons who regard one another as moral equals. […]

Therefore, for a given distribution, the "good" or "bad" luck[75] (if it can even be characterized as such, *a priori*) brought into the distributive sphere by the various distributees, can in no way be regarded as a (positively or negatively) dominant good. Whatever result it produces, as in *Frico*, is at most a small inequality, impliedly part of the distributive principle, and intrinsic to that distribution, that day, in that sphere.

However, as soon as it has manifested itself, it becomes vulnerable to being converted, or to converting itself, into a dominant, and over a longer period of time the specific piece of luck (being born to wealthy parents, for example) can most definitely be used tyrannically. Unless it is explicitly part of the shared meaning of a good, its presence in the sphere in which that good is being distributed would then represent a boundary breach.[76]

Returning to the case of *Erpelding*[77], the outbreaks of mastitis and Canadian flu which caused Mr Erpelding's farm to do badly between 1981 and 1983, were matters of sheer luck; indeed, one of his arguments before the Court was *force majeure*. He has a good point here, even though the Advocate General accused him of trying to rely on "an "invented" provision"[78]. Could he not say to the Luxembourg authorities that their perfunctory use of the period 1981-1983, when distributing quotas, was unjust, as it forced him to bring into the distributive sphere a piece of historical bad luck, belonging to a separate time and a separate sphere? This piece of historical bad luck, he could continue, was unrelated to, and not part of the meaning of, a quota[79]; its presence in the sphere governing the distribution of quotas was tyrannical. Alternatively, he could separate the historical bad luck from the history itself, and claim that, whilst farmers' performances between 1981 and 1983 *were* part of the shared meaning, any luck elements were *not*. This would be the equivalent of having a defence of *force majeure*. The final outcome cannot be known until the

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Undeserved, unwagered, unchosen inequalities warrant redress." Quotation from Eric Rakowski, *Equal Justice* (Clarendon Press, Oxford 1991) 75-76.

[75] As in luckiness generally, not a specific piece of luck.

[76] Already in this dissertation it has been seen how a person's *attributes*, which are another piece of historical luck, are to be regarded as having been separately distributed, in a separate sphere. The bringing of them into a second sphere represents a border-crossing, legitimate or illegitimate, depending on the shared meaning of the good being distributed. See supra section 3.3.

[77] Case 84/87 *Erpelding*, supra n 23, and accompanying text.

[78] Ibid., at 2661 (Para. 5 of the Opinion).

[79] As explained above, that would be a matter for the entire community.

distributive community has spoken, but it can at least be seen here how *historical* bad luck inhabits its own sphere, and that its importation into a second sphere is not automatically just, but is contingent on the say-so of the community.[80]

[80] The same analysis would apply to the milk producers whose production had not increased between 1991 and 1993 in *Karlsson*: Case C-292/97 *Karlsson*, supra n 29, and accompanying text.

7. Reflections

7.1. Introduction

In order to reach a conclusion as to whether Michael Walzer's theory of complex equality can be used by the European Court of Justice in its equality case-law as a complement to the Aristotelian test, it is necessary to look first at three counter-arguments, which arise from the case-study but which are not specific to any one type of ground. These are the need for judicial interventionism, the possible need for expert evidence, or even specialized courts, and the need to rewrite legislation. They will be dealt with in turn.

7.2. Three counter-arguments

7.2.1. The need for judicial interventionism

The ECJ judge, at least when making a preliminary ruling pursuant to Article 267 TFEU (ex Article 234 EC), is conventionally required to pronounce upon the relevant law only and to distance himself or herself[1] from the actual facts of the case. They are a matter for the referring judge, that is, the judge in the national court which made the reference. In the point comes up, the Court usually says something neutral, like:

> *"It is established case-law that, in the procedure laid down by Article 177 of the Treaty providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it."*[2]

However, sometimes it hints that the boundary between law (ECJ) and fact (national court) may not be so clear-cut:

[1] Henceforth the masculine only will be used, gender-neutrally.
[2] Case C-334/95 *Krüger GmbH & Co. KG v Hauptzollamt Hamburg-Jonas* [1997] ECR I-4517, para. 22.

> *"It follows that in such a case it is for the national court, and if necessary, the Court of Justice to appraise the application of those provisions having regard to all the rules of Community law, including freedom of expression […] as a general principle of law the observance of which is ensured by the Court."*[3]

For the Court, it is a "porous" boundary, as Davies has noted[4]. Meanwhile, the legislative draughtsperson is more decisive, for example:

> *"The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules or national law or practice."*[5]

Under the Aristotelian regime, which, as has been seen many times, requires only a superficial analysis of the circumstances of the case, the allocation of competence as between the national and European courts has not usually been a problem, although the ECJ judge has from time to time strayed into the supposedly forbidden territory, often during the objective justification stage in a case of indirect discrimination. Such straying is a form of judicial activism – a judge venturing into areas beyond his remit[6]. Perhaps this particular form is better described as judicial "interventionism"[7]. Under complex equality, meanwhile, the circumstances are all. What is being distributed, and by and to whom? What is the shared meaning of the distribuend to the distributive community? What distributive principle is being used and is it in keeping with the meaning ascertained in the previous question? All these matters need resolving, and they are unlikely to be resolved without a thorough airing of the facts of the dispute. To take a concrete example, in the case of *Gillard*, which

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[3] Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] ECJ I-2925, para. 44 (emphasis added).

[4] G Davies, *Nationality Discrimination in the European Internal Market* (Kluwer, The Hague 2003) 36.

[5] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 ("Directive 2000/78" or the "Framework Employment Directive"), recital 15. The question of which court is competent to assess the facts is further discussed in A Arnull, "Annotation *Arsenal Football Club plc v Matthew Reed*" (2003) CMLRev 753, and G Davies, "The Division of Powers between the European Court of Justice and the National Courts" 2004 conWEB – webpapers on Constitutionalism and Governance beyond the State No 3. Both of these contain further interesting references.

[6] Although it is not the most notorious form, which of course is where the judge tries to usurp the role of the legislator.

[7] Davies, supra n 5, 28.

was briefly examined in Chapter 5[8], and where the good at issue was a special old age pension, Mayras AG put the matter very clearly:

> *"Naturally it is not the Court's function to classify the French provision in question with regard to Community law or indeed to inquire whether the law in question is intended to confer benefits strictly in the nature of compensation or whether it also has the objective of compensating ex-servicemen and prisoners of war "for the hardships undergone by them and the services rendered by them to the country.""*[9]

It was not for the ECJ, according to the Advocate General, to ask what the good was for, in other words, to enquire as to its *meaning*. But such an enquiry would be the first port of call for a Walzerian analysis. There is no doubt that a Walzerian disposal of this case would look quite different from an Aristotelian one.

However, to take a more complex example, in *Dirk Rüffert v Land Niedersachsen*[10] (a kind of sequel to the *Viking* and *Laval* cases[11]), the "good" was a German obligation to pay posted workers in Germany the same wages as local workers[12]. Even for a Court utilizing an Aristotelian approach, the meaning of the good here was absolutely vital. Was it to protect the posted workers, to give them genuine additional help by ensuring that they received a wage that was significantly higher than their "home" wage?[13] Such beneficence on the part of the German authorities might well qualify as an objective justification (for breaching the incoming company's free movement rights)[14], allowing Land Niedersachsen to win the case. Or was it to protect German building undertakings from competition, by discouraging foreign undertakings from moving in the first place? Such a goal could never qualify as an objective justification (measures restricting free movement cannot be justified by economic aims), and for the Court to take this line would spell defeat for Land

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[8] Case 9/78 *Directeur régional de la Sécurité sociale de Nancy v Paulin Gillard and Caisse régionale d'assurance maladie du Nord-Est, Nancy* [1978] ECR 1661. See supra section 5.4.2.
[9] Ibid., at 1671 (Mayras' emphasis).
[10] Case C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989.
[11] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767.
[12] The distribuend could also be the equal wage itself.
[13] Once again, see how it is at the objective justification stage of a case that temptation to consider the facts is strongest.
[14] The Advocate General (Bot AG) thought it was.

Niedersachsen. Thus the entire outcome of the case turned on the meaning of the good to the distributor and to the potential distributees – a factual issue. In the course of his opinion, the Advocate General (Bot AG) often declared that this was a task for the domestic judge:

> *"It is for the national court, which enquires as to the true objective pursued by the legislature, to determine whether, viewed objectively, the rules in question ensure the protection of posted workers or, more generally, the prevention of social dumping."*[15]

But he went on to offer his own painstaking analysis of the meaning, anyway. In its judgment, the ECJ did not even waste time with a bogus ascription of roles, but went through and pronounced upon all of the proposed justifications itself, ending with a proclamation (that the German measure was contrary to Community law) which would of course be binding on the referring court, leaving it with no say in the facts at all.[16] The point is that judicial activism *of this sort* is already so prevalent[17], that it is sometimes hard to see how a switch to a Walzerian equality-model would actually make anything worse. Certainly, use of Aristotelian reasoning did not prevent judicial interventionism in equality cases like *Walloon Waste*[18], or *Kuratorium* (where the Court indulged in a large amount of arguably inappropriate fact-finding)[19], or *Bickel and Franz*[20]. However, it cannot be argued that, by using complex equality, the ECJ would have to upset the jurisdictional balance as between it and the national court, any more than it is already upset.

On the plus side, the issue is only relevant to the preliminary reference system. In challenges to Community legislation under Article 263 TFEU (ex Article 230 EC), for example, the ECJ itself would be the fact-finding tribunal, and it could

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[15] Case C-346/06 *Rüffert*, supra n 10, at 2018 (Para. 115 of the Opinion) – footnote omitted. Bot AG even puts this allocation of duties into his final conclusion, at 2023 (Para. 136 of the Opinion).

[16] The Court several times refers to the "case-file submitted to the Court" (for example, at paras. 40 and 42), as though to underline that it has looked at everything before drawing its conclusions. But were all of the factual data sent to Luxembourg in the first place? They were not in the *Arsenal* case, discussed by Arnull, supra n 5. Under a Walzerian regime they would be, as it would be clearly understood that they were required.

[17] For another example, see Arnull's commentary on the *Arsenal* case: Arnull, supra n 5.

[18] Case C-2/90 *Commission of the European Communities v Kingdom of Belgium* [1992] ECR I-4431.

[19] Case C-457/93 *Kuratorium für Dialyse und Nierentransplantation e.V. v Johanna Lewark* [1996] ECR I-243.

[20] Case C-274/96 *Criminal proceedings against Horst Otto Bickel and Ulrich Franz* [1998] ECR I-7637. See discussion of this case at supra, section 5.4.3.

then investigate the facts of the case as thoroughly as it wanted without censure. Furthermore, Rasmussen has pointed out that forays by the ECJ into factual matters can have beneficial consequences:

> *"[Y]et another means of controlling the overall acceptability of judicial outcome might be the taking of steps, judicial or otherwise, aiming at enhancing the Court's access to socio-economic fact. […] [T]he absence of such fact[s] occasionally entails catastrophic consequences, and […] the usage of socio-economic fact in recent case law ha[s] triggered important salutory effects. […] [O]nly by generalizing the availability of such fact might the Court, as a rule, make safe choices between various decisional alternatives because it will have been enabled to access fully the implications and ramifications of all of them."*[21]

Thus, the Court's using fact can have positive effects; in some cases, it could even be argued that, without access to fact, the Court's contribution is deracinated and effectively worthless.[22]

But, if still thought necessary, solutions to the problem of judicial interventionism are available. A first possible solution can be extrapolated from Walzer's general preference for particularism (not to mention the doctrine of subsidiarity). As it is the local community whose shared meaning is at issue (usually) in an Article 267 TFEU[23] reference, it is the *national court* which is best placed to host the final adjudication, if such an adjudication is needed.[24] However, rather than shying away from the facts of the case and simply batting it back down to the referring court with a bland and possibly even useless ruling attached[25], it is submitted that the ECJ should have a sort of "first look" at the facts and deliver

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[21] H Rasmussen, *On law and policy in the European Court of Justice: a comparative study in judicial policymaking* (Kluwer, Dordrecht 1986) 512.

[22] Certainly Hosking is of that view in relation to disability discrimination: "The justifications which will almost certainly be offered for discriminating against disabled people relate to safety, business necessity, the costs of accommodation and the rights of others. If the Court does not insist on a sufficiency of evidence to seriously look behind these justifications… the effectiveness of [Directive 2000/78] will be considerably reduced even within the narrow scope of its intended reach." See DL Hosking, "Great Expectations: Protection from discrimination because of disability in Community law" EL Rev 2006, 31(5), 667, 678.

[23] Ex Article 234 EC.

[24] For example, whether or not the German populace would be confused by a cosmetic product's being called "Clinique" is surely a question which only the German populace itself can definitively answer: Case C-315/92 *Verband Sozialer Wettbewerb eV v Clinique Laboratoires SNC et Estée Lauder Cosmetics GmbH* [1994] ECR I-317. But the *reference* in this case was still necessary to establish that the measure at issue was a product rule and not a selling arrangement. And of course the reverse is also true. If Community legislation or behaviour was at issue, it would be the *ECJ judge* who would be best placed to adjudicate. The ECJ would probably (although not necessarily) be the best choice in staff cases as well.

[25] Also a common occurrence under the Aristotelian test.

an interim opinion or view (to put it no stronger) as to the nature of the shared meaning, the distributive principle arising therefrom, whether or not such distributive principle is in fact being used, and thus whether or not complex equality has been violated. While any *legal* rulings which it made would be supreme as usual (including with regard to the second of these four matters, where the issue of which distributive principle goes with which shared meaning *might* be regulated by law), the Court's opinion or view on the first, third and fourth of these matters would be advisory only. The national court could use it as a guide, but would retain competence to make the final decision. The sort of mini-trial which the ECJ would have to stage here is not uncommon in the law – such hearings may be observed in many different courts, during the admissibility stage of an appeal, for example, or where a judge is called upon to rule on the need (or otherwise) for interim measures. In both these examples, courts have to steer a careful middle course between the necessity for a just decision based on all of the relevant issues, and the desire, usually on all sides, not to perform such an accurate dress-rehearsal of the future (or possible future) trial that the need for such a trial is obviated altogether. There would seem to be no reason at all why the ECJ should not be able to steer such a course.

A second possible solution is that *only the national court* should involve itself in the ascertaining of the shared meaning, with the ECJ perhaps given a new cassation-style role (which would involve making it hierarchically superior to the national courts). It could then *review* the domestic court's decision. If it felt that the national court had worked out the shared meaning or the distributive criterion wrongly, or that its conclusion as to whether or not there had been a breach of complex equality was flawed, it could send the matter back down to the *same* court for a retrial. Minus the Walzerian element, this is Gareth Davies' preferred remedy for the law-fact problem.[26]

A third and final solution would be that *only the ECJ* should involve itself in the ascertaining of the shared meaning. This would only work if it was considered better for the adjudicator or referee himself to be from *outside* the distributive sphere concerned[27]. As long as the forum was faithfully recreated in the European Court, with all views heard (and examined) in full, then the foreign

[26] Davies, supra n 5, 26 et seq.
[27] The matter is debated at section 7.2.2. immediately below.

location should not alter anything. In fact, the "fairy-tale Grand Duchy"[28] might prove to be an ideal venue for a climactic showdown between two rival factions.

Whichever solution is chosen, the new arrangement will have the added advantage of bringing to an end the current, intolerable situation. By spelling out once and for all the allocation of duties as between the ECJ and the national court, things might become clearer and more predictable.

7.2.2. The possible need for expert evidence, or even specialized courts

Following on from the previous argument, it is reasonably easy to imagine a judge at the ECJ deciding on the first question mentioned there, having heard counsel on both sides, or even by simply reading the pleadings. The second and third questions, though (the third by virtue of being contingent on the second), pose a problem. How is the shared meaning to be discovered? To be sure there is nothing to stop counsel reporting what they *think* it is, which would of course be the shared meaning most favourable to their client. But with both advocates and the judge or judges unlikely to be members of the relevant distributive community themselves, it would be a violation of complex equality to allow any of them to definitively pronounce upon the meaning[29]: that is a job for the forum and the forum alone, *assuming it can reach an agreement*. However, if (or more likely when) there is a conflict, and the fact that an action has been brought is almost definitely proof that there is indeed a conflict, it does not seem unreasonable for an arbiter (or "referee") to be charged with resolving the argument one way or the other.

Such an arbiter might come from inside the pertinent sphere, or he might come from outside it – there are advantages and disadvantages to both situations. The internal arbiter would have local knowledge (he would be a kind of relative of Walzer's "connected critic"), but both parties to the conflict might suspect him of bias. Meanwhile, the external arbiter is less knowledgeable, but more impartial. Nevertheless, if an external arbiter were to be used, he would still

[28] GF Mancini, "The Making of a Constitution for Europe" [1989] CMLRev Vol 26, No 4, 595, 597.
[29] It is true that the *advocates'* contributions may simply be a repetition of the views of their clients, who almost certainly *are* members of the distributive community at issue. But they might just as easily be part of a legal strategy dreamt up by the advocates *on their own*.

have to have the approval of the members of that sphere[30]. Nor would any decision arrived at by the arbiter need to be the final word on the particular question at hand; debates on meanings (as has already been seen[31]) are ongoing, so the arbiter's ruling would really only be a way of settling, in the short term, the argument in front of him, and might well only hold until the next conflict arose.[32]

It follows that the ECJ judge or judges may legitimately hear submissions on the (disputed) meaning of the distribuend, prima facie without violating Walzer's theory. However, it is also plain that these submissions should not just contain the advocates' view on the meaning, or even their clients' view on the meaning, but must consist of nothing less than a presentation, to the Court, of *the distributive community's view on the meaning* (or at least said view as discerned by the party in question).[33] This means that convincing evidence would have to be adduced, not just of the proposed meaning itself, but also of the number of supporters which that meaning had locally[34]. Only after hearing both sides' presentations, in the course of a fully adversarial proceeding, could the judge properly adjudicate as to which meaning was, for the time being anyway, the true one.[35]

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[30] *Quaere* whether, in the case of the ECJ, this would lead to the politicization of judicial appointments.

[31] See supra section 2.4.

[32] But this is really not that dissimilar to the way in which the ECJ, and national courts within the EU, already operate today.

[33] In *Grant*, for example, the Court implied that there had been no advancement at Member State level of views on the equivalence of same-sex partnerships and opposite-sex partnerships: Case 249/96 *Lisa Jacqueline Grant v South-West Trains Ltd* [1998] ECR I-621 – see in particular paras. 32 and 35. As Mancini and O'Leary point out, "it will be regretted that further and more detailed *evidence* of this lack of evolution was not adduced". See GF Mancini and S O'Leary, "The New Frontiers of Sex Equality Law in the European Union" European Law Review, Vol. 24, No. 4, August 1999, 331, 351 (emphasis added).

[34] It is not just a numbers game, however. As mentioned at 4.4.2.4., n 171, advocates would also be able, if they wanted to, to use their written pleadings and oral submissions to request that the Bench apply the Override, possibly to the meaning which they themselves had adduced, but more likely to the meaning adduced by *the other side*, if and when the latter meaning was accepted. As the European Court of Human Rights itself has put it, "Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position": *Leyla Şahin v. Turkey*, Application No. 44774/98, 10 November 2005, para. 108.

[35] Common lawyers have for many years complained that the ECJ is not adversarial enough, and that it tends to adjudicate on points that were not argued before it: L Neville Brown and T Kennedy, *The Court of Justice of the European Communities* (Sweet & Maxwell, London 2000) 402. One of the early Advocates General (Verloren van Themaat AG) also called for an

From all this, it is obvious that some expert evidence might need to be adduced. While representative members of the distributive community could be called to testify as to what Walzer might call the *view from the cave*[36], or indeed they might opt to appear of their own volition[37], more specialized witnesses might be required, such as those whose job it is to take polls or surveys in the community in question, or, depending on the nature of the distribuend, historians, anthropologists, and so on. Some of the purported meanings themselves might be complex, for example, in the tax field, necessitating the appearance in court of economists, actuaries, and the like. Ultimately, it may even be thought better to have separate panels of specialist judges, each dealing with a different sort of distribution[38]. The consequences of these developments, both in terms of expense and duration of cases, would be not insubstantial. It is thus an argument *against* the ECJ's using complex equality that to do so would put financial pressure on both litigants and the EU taxpayer, and would exacerbate already lengthy backlogs.

On the other hand, there are a number of arguments in favour of the admission of specialist evidence. Specialist witnesses can assist the judges on technical questions which may arise, thus leading to a better quality of assessment. Furthermore, many other courts and tribunals around Europe already make use of experts; the WTO Panel, for example, is in a regular dialogue with experts,

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increased use of argument: Case 94/84 *Office national de l'emploi v Joszef Deak* [1985] ECR 1873. In the Advocate General's opinion, the Court should not take a position on whether the granting of a tideover allowance to Mr Deak (a Hungarian national who happened to also be the son of a Community migrant worker) would or would not break up the national system, without hearing argument first. The Court ignored the Advocate General, and clearly decided that it would *not*. Verloren van Themaat's approach was arguably a proto-Walzerian one, asking effectively for an investigation into the local community's understanding of the tideover allowance (what and who was it for?), before deciding whether or not Mr Deak should receive it. He was correct that such an investigation involves the Court hearing arguments from all "interested parties" (at 1879) (and he included other Member States, whose nationals might of course be distributees, or, in Mr Deak's case, parents of distributees). Such a debate is vital. The Court – at least under orthodox complex egalitarian theory - cannot simply invent an understanding off its own bat.

[36] See the discussion at M Walzer, *Spheres of Justice – A Defense of Pluralism and Equality* (Basic Books, New York 1983) xiv (hereinafter referred to as *Spheres of Justice*).

[37] Indeed, in the UK, such third party interventions are becoming quite common in judicial review proceedings: Roger Smith, "Benign intervention" *Law Society Gazette* (London 12 November 2009) 10. They are already common in the US.

[38] Such specialist judicial panels are already foreseen by Article 225a EC (introduced by the Nice Treaty), which, since the coming into force of the Treaty of Lisbon, is now Article 257 TFEU. An example is the European Union Civil Service Tribunal. For more on this, see N Lavranos, "The new specialised courts within the European judicial system" 2005 EL Rev 30(2), 261.

and at the German Federal Patent Court in Munich, it is common to see chemists *on the Bench*. Even as things stand (that is, without the adoption of a Walzerian approach to equality), it is not certain how long the ECJ can maintain its current *iura novit curia* stance. The Court has already used its power to call for an expert opinion in staff and competition cases[39]; why not cases concerning equality? As already mentioned, third parties from the distributive community who hear of the litigation might also apply to intervene in the case, to give the Court further guidance on the meaning of the distribuend.[40] By widening the debate out, so that it (rightly) goes beyond the individual concerns of the two parties to the case, democracy too is arguably enhanced.

7.2.3. The need to rewrite legislation

Another consequence of the Court's adopting a Walzerian approach to equality to sit alongside the current Aristotelian one would be that certain legislation might have to be rewritten, or even scrapped, especially where it sought to recreate or codify the Aristotelian test itself. Examples of word-for-word codifications are admittedly rare. One such was Article 60(1) of the now-defunct Treaty establishing the European Coal and Steel Community:

> *"Pricing Practices contrary to Articles 2, 3 and 4 shall be prohibited, in particular:- unfair competitive practices, especially temporary or purely local price reductions tending towards the acquisition of a monopoly position within the common market;- discriminatory practices involving, within the common market, the application by a seller of dissimilar conditions to comparable transactions, especially on grounds of the nationality of the buyer."*[41]

[39] Case 12/68 *X. v Audit Board of the European Communities* [1969] ECR 109 (report ordered on official's mental state); Case 48/69 *Imperial Chemical Industries Ltd. v Commission of the European Communities* [1972] ECR 619 (report ordered on the market in dyestuffs). See A Alemanno, "Science & EU Risk Regulation: The Role of Experts in Decision-Making and Judicial Review" in *European Risk Goveranance - Its Science, Its Inclusiveness and Its Effectiveness*, Connex Report Series No. 6, E. Vos, ed., February 2008 <http://ssrn.com/abstract=1007401> accessed 21 March 2010, 23 for further examples. Alemanno believes that, after many years of reticence, the Court is now showing "some readiness to become more involved in the examination of scientific evidence": ibid., 20.

[40] The ECJ already has power to allow third parties to intervene in cases before it. See, for example, Case T-37/04 *Região autónoma dos Açores v Council* [2008] ECR II-103, where a number of local fishermen's associations intervened in a challenge, by the Azores, of a Council Regulation restricting the islands' exclusive fishing rights.

[41] And now see Article 101(1)(d) TFEU (formerly Article 81(1)(d) EC).

Another example is to be found in the tenth recital in the Preamble to the new Equal Treatment Directive[42]:

> *(10) […] According to the case-law of the Court of Justice, discrimination involves the application of different rules to a comparable situation or the application of the same rule to different situations.*[43]

However, other instruments, such as the Employment Framework Directive[44] and the Race Directive[45], contain provisions which are Aristotelian in spirit if not actually in letter, for example, the definition of direct discrimination at common Article 2(2)(a).

That is not to say that such instruments do not serve a useful purpose, for example, by setting out the scope of Community competence, but simply that they should not seek to *petrify* evolving shared meanings, for example, the shared meaning of jobs, the shared meaning of training, and so on. In most cases, though, the provisions in question simply require rewording, leaving room for case-by-case decision-making. At least some of the red lines should be converted into orange lines[46]; legislation such as this should point, but not emprison.[47]

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[42] Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [2002] OJ L269/ 15.

[43] Footnote omitted.

[44] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 ("Directive 2000/78" or the "Framework Employment Directive").

[45] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22 ("Directive 2000/43" or the "Race Equality Directive").

[46] It is not the intention of this dissertation to advocate the *abolition* of red lines, though. First of all, there should always be a minimum of red lines, which can then serve as the limit beyond which society will not allow people to fall (or be pushed). This is a boundary the need for which Walzer himself acknowledges, and which he labels the "safety net": M Walzer, "Exclusion, Injustice, and the Democratic State" Dissent, 40 (1993), 55, 57. However, towards the end of this important 1993 essay, he entertains the idea of even greater encroachment by the nation (or perhaps in this case the supra-nation) into the spheres of justice, specifically when autonomy has failed: "[e]xclusion is a sign that the [citizens'] contests have gone badly – an invitation, therefore, to the state to set them right"; "[t]he state – or, at least, the modern democratic state – must defend the values of complexity and equality on behalf of all its citizens": ibid., 63 and 64. So it is not anti-Walzerian for a state or quasi-state to pass more thorough legislation (that is, to create a more extensive network of red lines) where it is intervening in a distributive community whose members are, for one reason or another, foundering. As Gardner has put it, "The law of discrimination sits comfortably in [a] non-individualistic theory of autonomy, according to which the state has its own project of providing the conditions of valuable flourishing for its citizens. In this theory, prohibiting… discrimination

is merely a central and straightforward example of the state's legitimate role": J Gardner, "Liberals and Unlawful Discrimination" Oxford Journal of Legal Studies, Vol 9, No 1 (Spring 1989) 1, 22. Even McCrudden, who is on the whole critical of communitarianism, has written that it is a mistake to "assume that a system of rights leaves no room for benevolence or communal sentiment… A system of legal rights is not necessarily inconsistent […] with a belief in the pre-eminence of "the good", including a belief in constitutive community": C McCrudden, "Community and Discrimination" in J Eekelaar and J Bell (eds), *Oxford Essays in Jurisprudence (Third Series)* (Clarendon Press, Oxford 1987) 221, 227-8.

[47] Harris makes a similar plea in the gender equality context: "Even a jurisprudence based on multiple consciousness must categorize; without categorization each individual is as isolated as [Borges' character] Funes, and there can be no moral responsibility or social change. My suggestion is only that we make our categories explicitly tentative, relational, and unstable, and that to do so is all the more important in a discipline like law, where abstraction and "frozen" categories are the norm." See Angela Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42 Stanford Law Review 581, 586.

8. Presenting a theory of mediated complexity

8.1. Introduction

The ascertainment of the shared meaning of a given distribuend, and in particular whose job this should be, remains the thorniest issue in the dissertation thus far. There was some discussion in Chapter 2 of a "forum" consisting of all members of the relevant distributive community – distributors and distributees alike – and these terms, "forum" and "distributive community", have been used in all subsequent argument. Up until now, no further attempt has been made to describe the precise modalities involved in the establishment, running or regulation of these fora, other than some basic observations, for example, that these would vary from distribuend to distribuend and from community to community. In this respect, it will be remembered, Walzer's own lead is being followed, as he too preferred to leave his theory in the abstract, refusing to put any practical flesh onto the theoretical bones. Perhaps he worried that the flesh might crush the bones, and that complex equality, once removed from the rarified and controlled atmosphere of the laboratory, would quickly disintegrate in the harsher conditions of the real world. However, as this dissertation set out to assist a genuine court with a genuine problem, it is appreciated that it will have reneged on its promise if it delivers only in word and not in deed. Some limited comments on the nature of the Forum will thus be made in the first section of this chapter: section 8.2. Even then, there will be those who say that the theory remains too wooly to be of any practical use, at the ECJ or elsewhere. There will be still others who fear that Complex Equality would lead to a kind of Mob Rule, with a vociferous majority bullying minorities into silence, or out of existence. What if the distributive community votes against benefits for migrant workers, picking at the stitches of the very Union itself? What if the distributive community votes against women on maternity leave receiving full pay? What if the Override is not strong enough to temper the wilder excesses of the *demos*? It is for these people that an alternative theory, that of mediated complexity, is proffered in the second section of this chapter: section 8.3.

8.2. Further consideration of the Forum, and some possible problems

At section 2.4. above, some basic questions about the Forum are posed and then, hopefully, answered: Who should be present? What characteristics do they need? How are they to be treated, both during and after the debate? How often should the debate take place? However, the minutiae of the system are not given, and no indication is given of what a typical debate might look like, in concrete terms, or how consensus might be arrived at. One of the reasons for this is that, as restated above, every debate is dependent on its context and so fora would have no fixed size, location or voting system. It would be an endless task to try to describe all possible permutations. But certainly the idea of a group, even a large group, of citizens coming together collectively to discuss and decide upon a given matter should not be dismissed out of hand. One needs only think of the "gacaca" open-air community trials in Rwanda[1], or President Obama's Town-Hall meetings in the US. In Australia there is a long tradition of public consultation on law reform, including public hearings.[2] In a recent book, Fishkin describes a number of other real-life instances of what he calls "Deliberative Polling", including public consultations on wind power in Texas, on a budget crisis in Rome, on sewage treatment in China and on ethnic differences in Bulgaria.[3]

One objection to the idea of the Forum might be the physical impossibility of all the citizens of a country gathering together in one place, where the distribution under discussion was one which affected everyone (a tax matter, say).[4] This would be compounded by the difficulties encountered in trying to manage the debate or take a vote; it would also make a mockery of the idea of representative democracy. A counterargument, though, might be that

[1] Although the system was revived specifically to deal with the issue of genocide, traditionally the Gacaca were village assemblies to settle all kinds of disputes.

[2] M Zander, *The Law-Making Process* (CUP, Cambridge 2004) 507-511. The hearings are informal, without rules of evidence or legal representation, and sometimes even take place in the evenings. Zander quotes Mr Justice Kirby as saying that "[t]he fears of irrelevant and long-winded submissions or of hordes of unbalanced or nuisance witnesses has [sic] not been borne out" (at 509).

[3] JS Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation* (OUP, Oxford 2009).

[4] And what about all the citizens of twenty seven countries, if the distributive sphere were the whole of the EU? Nevertheless, in an interesting section entitled, "Putting Europe in one room", Fishkin describes how a real-life experiment was undertaken to try to do just that: Fishkin, supra n 3, 183 et seq.

representative democracy is outmoded in the age of the Internet, where many millions of citizens can vote simultaneously, on any matter and at any time, simply by pushing a button. In the time it takes the representative to travel to the capital city to attend at the parliament, those whom he or she represents could already have made their views known, in a way that is both more accurate and more democratic, on any number of issues.[5] In a future world where such "online democracy" was commonplace, the idea of multiple fora debating and voting on shared meanings, day in and day out, would not seem strange at all.[6]

A second objection to the establishment of Walzerian Fora might be to point out how, going back to the idea of a physical debate, a gathering of large numbers of people, all wishing to make their divergent views known, can often descend into chaos and even violence. One could perhaps plead as examples the demonstrations held at the WTO Summit in Seattle in 1999, the G8 Summit in Genoa in 2001, and the G20 Summit in London in 2009. Against this it could be counterargued that such "powder-keg" situations arise precisely because citizens are given too few opportunities to air their opinions, not because they are given too many. Once the novelty of permanent fora to determine shared meanings had worn off, it seems likely that things would settle down so that the only attendees would in fact be those with a genuine interest in discussing the matter at hand. As has sometimes worked in the sphere of criminal law, making something widely available leads to responsible usage tempered by self-regulation.[7]

Following on from this last point, though, is a more urgent worry. If the only attendees at the fora are those "with a genuine interest" in the topic at issue, might this not lead to a sort of tyranny-of-the-cognoscenti in the future, with the majority foolishly entrusting serious decisions to a minority who in time will come to wield disproportionate power over them? One thinks here of the Soviet Union, or even Orwell's *Animal Farm*, where "[t]he birds did not understand Snowball [the pig]'s long words, but they accepted his explanation"; by the end

[5] A Hungarian party offering online democracy as a basic means of representation - the "Party of Internet Democracy" (IDE) - contested the 2009 European Parliament elections.

[6] See how, even today, the millions of "blogs" and other networking tools enable 24-hour discussion on almost any topic imaginable.

[7] Walzer is also of the opinion that, while "impassioned, bloodthirsty mobs" do exist, "organized parties and movements of many different sorts, good and bad, are far more common": M Walzer, *Politics and Passion: Toward a More Egalitarian Liberalism* (Yale University Press, New Haven 2004) 120 (hereinafter referred to as *Politics and Passion*).

of the story, of course, the birds have become the pigs' slaves[8]. The job of representation should come at the price that those represented retain the right to vote their representative out of office. Unattended by such a democratic safeguard, representation becomes dangerous. If someone absents themselves from one of Walzer's Fora (and it is unlikely that anyone would be able to attend them all), they give away responsibility for the matter under discussion to others, a gift they may not be able to take back later.

Another question that some struggle with is whether the Walzerian Forum is the same as (say) the Member State's national parliament, or whether it is something else – a second entity. Given that the entire citizenry of the Member State is only one possible distributive grouping, the answer must surely be: something else. Walzer himself seems to be implying that it is something else:

> *"Democracy puts a premium on speech, persuasion, rhetorical skill. Ideally, the citizen who makes the most persuasive argument… gets his way. But… he must talk about the issues at hand. And all the other citizens must talk, too, or at least have a chance to talk."*[9]

This does not sound like a description of *Parliamentary* democracy in the classical sense.

The question that then arises is whether this second entity would clash with the national parliament, and how any clashes that there were would be resolved. This is a big issue. It is not the purpose of this dissertation to consider models of what is variously called participatory democracy, deliberative democracy or informal politics. Many books have been written on the subject.[10] Obviously one model would have to be settled upon, and its relation to the local parliament worked out. The challenges posed would not be insurmountable. One idea would be to give parliamentarians the "last word" after the Forum, umpired if

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[8] G Orwell, *Animal Farm* (Penguin Student Editions, Penguin, London 1999) 21.

[9] M Walzer, *Spheres of Justice – A Defense of Pluralism and Equality* (Basic Books, New York 1983) 304 (hereinafter referred to as *Spheres of Justice*) – emphasis added.

[10] Fishkin, supra n 3, and the many books he refers to; A Gutmann and D Thompson, *Democracy and Disagreement* (Harvard University Press, Cambridge, Mass., 1996); HS Richardson, *Democratic Autonomy: Public Reasoning About the Ends of Policy* (OUP, New York 2002); JS Drysek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (OUP, Oxford 2001); T Christiansen, *Informal Governance in the European Union* (Edward Elgar Publishing Ltd, Cheltenham 2004).

necessary by the judge, had delivered its view. Court cases could then act as a catalyst for legislative change, but then this is no different from the situation today, both at Member State level[11] and at EU level[12].

It can be seen, then, that there are several concerns raised by the idea of the Forum, some against which counterarguments may be put forward, others not. With the Forum being such a cause for worry, it seems sensible to at least countenance the idea of an alternative arrangement; one such arrangement is investigated in the next section.

8.3. Mediated Complexity

If a continuum were drawn between the European Court of Justice as it operates today, and the same Court as it might operate under a Walzerian regime of complex equality, as described above, a stark difference would be noted between the two positions in respect of shared meanings. At the one extreme, the Court effectively ignores shared meanings altogether, judging the case without isolating the distribution at its heart, and thus not caring what the distribution is, what its shared meaning is, or whether the distributive criterion utilized is or is not in keeping with said meaning. At the other extreme, though, the dependence on authentic shared meanings is such that the Court is to all intents and purposes a slave to the distributive community, unable to judge at all until such community has communicated its shared meaning for the distribuend in question, or until this has been thrashed out in the course of a no doubt lengthy game of interpretative tennis with the judge as referee. Could there be a middle course? In what follows there is proposed just such a middle course - a theory of *mediated* complexity.

The central plank of the theory of mediated complexity would be that the *judge* would take charge of the ascertainment of shared meanings, not this time as a

[11] In the UK, for example, where the Supreme Court (formerly the House of Lords) can delcare an Act of Parliament to be incompatible with the Human Rights Act 1998, effectively forcing Parliament to amend or even scrap the offending law.

[12] ECJ cases have often presaged changes to the Treaty, for example, Case 294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1339 and Case C-70/88 *European Parliament v Council of the European Communities* [1990] ECR I-2041. O'Leary refers to the Court's "policy-making leadership" and gives a large number of examples: S O'Leary, "The Free Movement of Persons and Services" in P Craig and G de Búrca (eds), *The Evolution of EU Law* (OUP, Oxford 1999) 380.

referee picking the side that made the best case, but literally discerning the meaning for him or her[13] self. This of course goes against much of what Walzer stands for, and certainly violates the second tenet of the theory of complex equality as described in Chapter 2 above, so much so that the word "shared" in "shared meanings" now seems redundant. The alternative theory set out in this section is not, unlike the earlier sections, supposed to be a faithful translation of the theory of complex equality into the world of European law, though. It borrows from or pays homage to Walzer's theory, but only as one weapon in the judge's armoury.

It would fall to the judge, then, to work out and declare what the distribuend at issue meant to the community in which it was distributed, or, if he thinks it more appropriate, to everybody. This last point is important. Under mediated complexity, it is open to the judge to dispense with Walzer's "relativism" altogether by deciding on a distribuend's meaning *erga omnes*. The fear that strange local proclivities would produce abhorrent meanings which in turn would produce abhorrent distributive criteria is significantly quelled if the meaning is drawn from a much larger interpretative pool, as it were, to begin with. For example, in the field of gender discrimination, the fear that the members of a predominantly male selection committee at a bank in the City of London might include "ability to enjoy lap-dancing outings with clients" as part of the meaning of a job at such a bank (not forgetting that they would not be the only participants in the Forum at which the meaning was ascertained), would be allayed altogether if what mattered was not what a bank job meant to the members of that particular "culture", but what it meant to all the world.[14] Complex Equality is thus distilled down to its bare essential: a theory of distributive justice, predicated on the interpretation of meanings. What something means (in the world generally) and how it is distributed (in the world generally) must match. Opening out the field of interpretation would also assuage fears of racist meanings being employed, as they might have been in apartheid South Africa. On this view of mediated complexity, the role of the Override is also reduced (almost) to nil, as applying a universal code to

[13] Henceforth the masculine form only will be used, gender-neutrally.

[14] Likewise the fear that a distributive community might conclude that being male (or of a certain age) formed part of the common understanding of what it is to be the Chief Executive of a multinational company.

particularist meanings, and universalizing those meanings in the first place, amount to practically the same thing.

Handing sole jurisdiction to decide on meanings to the ECJ judge need not be a recipe for arbitrariness and a return to (or continuation of) the unpredictability of the Aristotelian regime. It is submitted that there is also a substantive difference between a judge's deciding on the "alikeness" or "un-alikeness" of two entities, and a judge's deciding on the meaning of a distributed good. The second task is more –for want of a better word – *clear*, while the first is obscure and intangible. And a task that is clearer to those doing justice is also clearer to those seeing that justice is done. The Walzerian test is more accessible to those observing the Court's activities, its commentators and critics, not to mention the public, which in turn enables the judges to be put under more effective scrutiny. With Walzer, there is a chance not only to understand the answer, but also – for once – to understand the question.

Furthermore, it is still possible to set *rules* for the judge to follow in carrying out his task. One model could be the rules of statutory interpretation in English law (and other systems based thereon), which are used – in a loose and flexible way – by English judges when construing an Act of Parliament or Statutory Instrument. Indeed, as a model, statutory interpretation provides a neat parallel for the ascertainment of "shared understandings" in the Walzerian sense; both activities involve the teasing out of meanings, and both give rise to the fear, sometimes unfounded, of judicial caprice making outcomes unforeseeable and advice to litigants difficult. But just as the rules of statutory interpretation provide a check on judicial flights of fancy by limiting the judge to two or three easily-anticipated options, so a set of rules for the ascertainment of meanings would act to curb the more outrageous indulgences of an overly creative Bench.

The rules might be unwritten conventions, much like the English rules on statutory interpretation themselves. Alternatively, they might be codified in some way. Guidelines might be produced, along the lines of the Sentencing Guidelines in English law, or it is not uncommon for courts to produce Practice Directions to expand upon their basic rules of procedure. An important example is a Practice Direction at the International Criminal Tribunal for the former Yugoslavia, which elaborated a basic provision in the Rules of Procedure and Evidence to create a viable system for adducing witness statements where the

witnesses themselves could not attend the hearing[15]. Without such a system it is unlikely that any trials could have taken place. Other examples of Practice Directions include Practice Directions relating to direct actions and appeals (in EU law)[16], and to the power of the House of Lords to depart from its own previous decisions (in English law)[17].

But what should the rules *say*? One possibility – and what follows are possibilities only, not concrete proposals – would be to ground the set of rules in the three tenets of the theory of complex equality as presented in Chapter 2. The judge would become, as it were, the guardian of the tenets, ensuring that the different spheres of justice are kept separate, that shared social meanings are respected, and that dominance is prohibited. His principle task in an equality case would be to detect any distribution flawed by reason of boundary breach. But of course to know whether an alien attribute was crossing a boundary legitimately or illegitimately, he would first have to work out the shared social meaning of the distribuend at hand. He could approach this enterprise in a number of ways, some of them already mentioned in Chapter 7, such as the calling of expert witnesses, or other new ones such as appointing an amicus curiae to advise on the particular point or even (assuming that argument was going to be heard in open court) empanelling a jury to decide. In England anyway, it is the usual solution, at least in cases where a jury is already in place, to leave questions of *fact*, as opposed to questions of *law*, to a separate "tribunal of fact".

These ideas, though, take the matter further and further out of the judge's own hands, and represent a kind of liberal extreme. At the other end of the spectrum, a judge could simply carry out his own research (just as English judges construing statutes are now allowed to consult Parliamentary records and so on). An international judge taking time to ascertain local views is not such an unusual concept; the European Court of Human Rights often undertakes such an exercise, and indeed has a Research Division for precisely

[15] Practice Direction on Procedure for the Implementation of Rule 92*bis*(b) of The Rules of Procedure and Evidence, IT/192, 20 July 2001.
[16] [2004] OJ L361/15.
[17] *Note* [1966] 3 All ER 77. For another example from English law, see *Practice Note* [1980] 1 All ER 555, on the possible sentencing penalties for unmeritorious criminal appeals.

that purpose.[18] Alternatively, the judge could employ a "common sense approach"; relying on abstract concepts like "natural law" or some equivalent, he could fashion the meaning almost any way he wanted, but ensuring always that his view accorded with that which would be reached by one of English law's favourite characters, the "reasonable man".[19] He might indeed refuse to hear evidence where a meaning "permit[ted] of ready comprehension", "present[ed] no difficulty of application or understanding" or was "ordinary [and] uncomplicated"[20], what Lord Diplock called "a matter of first impression"[21]. In such a case, and following an equivalent of English law's "literal rule", he could simply give the distribuend its "ordinary natural meaning".[22] He could say, alternatively or in addition, that he was taking "judicial notice" of the meaning. Then again, he could back this up with a presumption, or series of presumptions, as the European Court of Human Rights does, for example, in cases of torture or inhuman or degrading treatment.[23] Thus, the "ordinary natural meaning" would be presumed *unless* one or other party adduced convincing evidence of a special meaning. The onus would then be on counsel to bring to the Court's attention, in particular via their pleadings, matters which they wanted it to consider, and which they knew it would not investigate *propio motu*.

It should not be forgotten, of course, that one possible meaning may already be on the table, namely the meaning utilized in the original, contested distribution. Even if this was not explicit it can usually be worked out, *a contrario*, from the fundamentum distributionis actually used. A very cautious judge could perhaps limit himself to upholding or striking down this original meaning, having set himself (or had set for him) a threshold of acceptability, along the lines of the famous *Wednesbury* test – in English law – that the courts should only interfere when an authority has come to a conclusion "so unreasonable that no

[18] Discussed in E Howard, "The case for a considered hierarchy of discrimination grounds in EU law" 13 MJ 4 (2006), 445, 458.

[19] See, for example, how Lord Morris in the case of *Brutus v Cozens* states that the magistrates who had earlier heard the case should have applied "rational judgment and common sense" to reach a decision: *Brutus v Cozens* [1972] 2 All ER 1297, at 1300. The issue here was the meaning of the word "insulting".

[20] All phrases from ibid., at 1300, 1301 and 1303.

[21] *Garland v British Rail Engineering* [1983] 2 AC 751, 771.

[22] *Brutus v Cozens*, supra n 19, at 1302.

[23] Injury sustained while under State control *means* torture et cetera, *unless* an "alternative explanation… ha[s] been forwarded by the Government". This quotation from the case of *Shishkovi v Bulgaria*, Application No. 17322/04, 25 March 2010, but the principle has been stated on many other occasions.

reasonable authority could ever have come to it"[24]. In other words, the judge would only strike down an existing meaning where the distributive community has arrived at a meaning so unreasonable that no reasonable distributive community could ever have arrived at it.[25] As an alternative, the judge could interfere only when a meaning was *perverse*; this is a standard that has already been encountered in the dissertation.[26] As with the ascertainment of the meaning itself, the judge will have to find (or have found for him) a workable approach for identifying a perverse meaning, but it seems likely that, to slightly paraphrase Lord Reid in *Brutus v Cozens*, an ordinary sensible person knows a perverse meaning when he sees or hears it.[27] The sexual orientation of the passenger's partner, for example, has nothing to do with the *meaning* of a train ticket.[28] Likewise, the nationality of the victim has nothing to do with the *meaning* of criminal compensation.[29]

In English judicial review cases, though, the Court does not try to stand in the place of the requisite authority, and make (or remake) the contested decision itself. Having struck a decision down, it sends the matter back to this authority so that it (the authority) can make a second attempt in the light of the Court's ruling. Should the ECJ, hearing an equality case, and applying the theory of mediated complexity, follow suit, and, in the event that it invalidates an existing meaning, refuse to spell out the "correct" meaning by itself? Again, if a strict Walzerian approach were being adopted, the answer to this question would probably be in the affirmative – the matter should be sent back down to the distributive community for redetermination of the shared meaning – unless one of the models sketched in Chapter 7 has been accepted, allowing the Court (for

[24] *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223, 230.
[25] Under a strict regime of complex equality, if it transpired that the "shared" meaning was not in fact that of the distributive community *at all*, for example, if it was the distributor's own, then the meaning could already be invalidated, and the distribution could already be declared flawed, by dint of breach of the second tenet. However, in the alternative version of the theory being presented here, in which much less importance is being placed on the element of "sharing", perhaps the judge would allow *any* meaning to be *the* meaning, as long as the reasonableness test (or equivalent) was satisfied. In such a case the test as stated in this sentence would have to be slightly rewritten, with a phrase like "decider as to meaning" or "meaning-interpreter" replacing "distributive community". Allowing non-shared meanings not just in Court but within the community as well represents, it is acknowledged, a further, massive break with orthodox Walzerian theory.
[26] An analogy could perhaps be drawn with the English "golden rule" here, that interpretations which result in absurdities must be avoided.
[27] *Brutus v Cozens*, supra n 19, at 1300.
[28] Case C-249/*96 Lisa Jacqueline Grant v South-West Trains Ltd.* [1998] ECR I-621.
[29] Case 186/87 *Ian William Cowan v Trésor public* [1989] ECR 195.

example) to have a "first go" at declaring the meaning, in a strictly non-binding way. However, in the theory of mediated complexity, the answer must be in the negative; unlike a public authority, a distributive community is too ephemeral a concept to be communicated with, albeit implicitly, in this way. The judge, *mediating* the complexity on behalf of the community, must provide the recast meaning.[30] Even then, though, the rejected meaning will no doubt provide some clues as to what the true meaning (for the moment, anyway) is or might be.

It should be emphasized again that this section sets out a range of possibilities, not a concrete plan. Mediated complexity is the half-way point on the continuum between the position today and the position as stated in the foregoing chapters, but even within mediated complexity itself there is a wide gamut of possible approaches for the ECJ to follow, depending which of the various options above it chooses. A number of different Courts of Justice might emerge. The Court might elect an accessible approach, throwing its doors open to a large number of helpers and advisers, or it might prefer to adopt a more remote position, standing aloof from the spheres themselves.[31] Adopting a "common sense" or equivalent approach, the Court might feel that in most cases it "knows best", and it might start to display the sort of paternalism of which the English Law Lords are sometimes accused. In contrast to such an imperious stance, the Court might borrow from the Continental traditions and choose to operate in a more inquisitorial manner. Like the English judges when they apply the mischief or purposive rules, or the more European teleological approach, the ECJ judge may decide to be more probing – looking into methods, motives and causes, rather than just taking things at face value. And as the depth of the Court's enquiry varies, so may the breadth. Perhaps the judge will wish to consider only the specific parties in front of him, producing judgments "confined to their particular facts", or perhaps he will opt to widen the focus, to produce judgments

[30] Or the Court could plot a middle course, by sending the matter back on some occasions, and deciding itself on others. For example, it might choose to send back where the distribution had taken place in the public sphere, and decide itself where the distribution had taken place in the private sphere.

[31] Another deviation from orthodox Walzerian theory. Such aloofness is a particular problem for Walzer, who disdains those who "fashion for [themselves]… an objective and universal standpoint" (*Spheres of Justice*, xiv). This has led him to a sustained critique of juridification, which perhaps reached its high-water mark with his review of Ronald Dworkin's *Taking Rights Seriously* (Duckworth, London 1977): The New Republic 25 (June 25 1977) 28. More recently, though, he seems to accept that "[m]uch… political debate takes place in the courts": "not always the best place, in my view, but the place where the nuts and bolts of membership and equality are most often addressed". See *Politics and Passion*, xiii-xiv.

of more general application. A lot will depend on how much work the Court wants to take onto its own shoulders. At the moment, for example, the Court of Justice will not consider pleas other than those appearing in the parties' previously-lodged pleadings, while the European Court of Human Rights, for example, is much readier to pursue extraneous matters *propio motu*.

Put simply, adopting a regime of mediated complexity does not commit the ECJ to any one particular judicial style, but rather would offer the Court a choice of different styles. When it comes to the trade-off between interpretative complexity and judicial efficiency, it will be up to the Court to decide how much of the one it can cope with, without causing irreparable harm to the other.

What is being offered in this dissertation is a rule or set of rules to help the European Court to decide the equality cases before it, *not* to conjure up the result as if from Aladdin's lamp. Complex equality, and mediated complexity, are not touchstones, or yardsticks, or ready reckoners. Rather, they are "a common language and a shared set of concepts for talking and thinking about questions of… equality"[32], in other words, "a framework for debate"[33]. The debate itself does not end, then, but *its quality improves*. It can be seen how the judge's reasoning is much more considered and much less rigid. It is context-sensitive; it sticks close to the subject-matter of the case, placing it at the very heart of the debate. It resists deviations into less pertinent considerations and avoids reductionist, black-or-white rhetoric. Of course, policy questions remain difficult for a judge to call – or indeed he may feel that he cannot call them at all and must leave them for the legislature. This is a problem which judges perennially face, and no amount of theories will solve it. A complex system of presumptions might bring some relief, but would inevitably just transfer the policy dilemma in question from the judge to whoever's job it is to write the presumptions.[34] Thus, some lines in the sand may remain, but there is a new

[32] JM Balkin, "*Plessy*, *Brown*, and *Grutter*: A play in three acts" 26 Cardozo L Rev 2004-2005, 1689, 1699, referring to what he calls the "tripartite theory" in the US, which divided the rights of citizens into civil, political and social rights, but offered equality in respect of the first category only. However, its replacement, the more familiar model of strict scrutiny and suspect classifications, is also described by Balkin as "a language for talking and thinking" (at 1690).

[33] RB Siegel, "Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action" [1997] 49 Stan L Rev 1111, 1120, also referring to the "tripartite theory".

[34] A concrete system of presumptions is not favoured as it would cost the theories their fluidity, which is one of their best qualities. However, for the sake of completeness, the matter is briefly considered here. As a preliminary point, the system would have to exclude all distributions of

concern for what Homi Bhabha has called the "border lives"[35], those caught in the "in-between moment"[36], frozen as they attempt to cross from one sphere to the next. Focusing on this "intervening space"[37] means more than just focusing on exceptional cases – cases that are exceptional to some rule. It involves challenging the very rule itself:

> *"The hither and thither of the stairwell, the temporal movement and passage that it allows, prevents identities at either end of it from settling into primordial polarities. This interstitial passage between fixed identifications opens up the possibility of a cultural hybridity that entertains difference without an assumed or imposed hierarchy…"*[38]

Complex equality both "displays *and displaces* the binary logic through which identities of difference are often constructed"[39].

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criminal sentences and other State-endorsed sanctions. This should not prove too much of a problem at the ECJ, which does not hand down criminal penalties, although it does hand down some civil ones. The easiest presumptions would be along the lines of "*in dubito pro* distributor" or "*in dubito pro* distributee", but these would most likely be condemned as too simplistic, given the wide variety of distributions at issue. A more useful set of presumptions would be:

1. The Reasonable Distributor distributes according to a meaning which combines the interests of the Distributor and the interests of the Distributee in a ratio of fifty to fifty.
2. Assuming that a distribution in line with Presumption 1 is impossible, the Reasonable Distributor gives additional weight (that is, from 51% of the total weight to 100% of the total weight) to the meaning of the party ("the first party") whose predicted position, following a distribution carried out according to the meaning of the other party ("the second party"), would be worse than that of the second party following a distribution carried out according to the meaning of the first party.

Elsewhere in this dissertation, Presumption 2 has been referred to as a kind of "hardship rule". However, this would not settle everything and further presumptions would be needed to decide between, say, damage to life and limb and damage to material assets, in varying degrees and timeframes.

[35] HK Bhabha, *The Location of Culture* (Routledge, London 1993) 1.
[36] Ibid., 5.
[37] Ibid, 10.
[38] Ibid., 5.
[39] Ibid., italics added.

9. Evaluation

9.1. The two methods compared: *Erpelding*

If one takes a case like *Erpelding*, step by step, one can see clearly where the Aristotelian test goes wrong. The first conclusion which the Aristotelian analysis produces in this case is that milk producers who did well between 1981 and 1983 and milk producers who did badly between 1981 and 1983 are "like". This seems uncontroversial, but already the Aristotelian analyst is guilty of superficiality. The Walzerian analyst, meanwhile, would have spotted that they are not alike at all – one comes to the quota-distribution empty-handed, but the other, to make an analogy with a casino, brings with them a chip which they have already won at another table.

The second Aristotelian conclusion here is that the two categories of milk producer, whilst like, were *treated* "unlike"; the producer who did well between 1981 and 1983 received an additional individual milk reference quantity. Again, this analysis does not go far enough. The *reason* for this disparate treatment (having done well during the period 1981-1983, or having done badly during the same period) seems completely inappropriate. In Walzerian terms, the reason for the *distribution* (or the *distributive criterion*) is wrong.[1] But the Aristotelian analyst is powerless to do anything here. Restricted to a "yes or no answer", and faced, on the one hand, with the granting of a quota and, on the other hand, with a refusal to grant a quota, he can only state the obvious: that the two "treatments" are dissimilar. He does not at any time, however, consider the *reason* for this, or answer the simple question: why? It is worth remembering Lord Walker's comment in the UK case of *Carson*[2]:

> *"One of the most powerful criticisms of a rigid, step by step approach based on comparators is, if I may respectfully say so, in the speech of my noble and learned friend Lord Nicholls of Birkenhead in Shamoon v Chief Constable of the Royal Ulster Constabulary […]. That was a case under the Sex Discrimination (Northern Ireland) Ord 1976 (SI 1976/1042) and this House had to grapple with the statutory definition of*

[1] Keeping in mind the Standard Contingent Reply.

[2] *R (on the application of Carson) v Secretary of State for Work and Pensions and Conjoined cases* [2005] UKHL 37.

> *discrimination. Lord Nicholls demonstrated that a step by step approach was liable to obscure the real issue in the case, which was <u>why</u> the complainant had been treated as she had been treated. Until that question was answered, it was impossible to focus properly on the question of comparators. Lord Nicholls […] observed […] that: "employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was…"*"[3]

Walzer, on the other hand, brings the reason or reasons into the middle of the debate, rather than relegating it or them to an afterthought:

> *"The phrase "for whatever reasons" conceals a problem […], which philosophers who are quick with hypothetical examples are prone to ignore. […] Social meanings are constructed, accepted, and revised for reasons, and we have to engage those reasons."*[4]

The third and final Aristotelian conclusion in *Erpelding* is that the unlike treatment of the two categories of milk producer is *objectively justified* on the grounds of certainty and effectiveness. The Court thus rubs salt in Erpelding's wounds by announcing that the need to have only one rule justifies the rule. The fact that it is or might be *the wrong rule* is not mentioned, even here, at the one point in the test where it might have been. The wrongness of the rule is only revealed via Walzer's root-and-branch scrutiny; the Aristotelian analyst satisfies him or herself with an inspection of the branch alone.

In other words, applying Walzer's doctrine to a case at the ECJ involving the principle of equality would facilitate a much more profound analysis of the original "distribution" giving rise to the case. If a distribution is substantially flawed, more often than not an Aristotelian assessment will simply not reveal this (as in *Erpelding*). Another significant defect in the "symmetric" approach to equality is its reliance on so-called objective justification as a means of rectifying any inequalities discovered. As the consideration given to the two comparators is so superficial, the objective justification acts as little more than a "rubber stamp" or "white-washing exercise", often condoning, and consolidating, the flaw in the original distribution.

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[3] Ibid., at para. 63 (Lord Walker's emphasis). The reference for the *Shamoon* case is [2003] UKHL 11, [2003] ICR 337. Lord Nicholls' observation is at 342, para. 11.

[4] M Walzer, "Objectivity and Social Meaning" in M Nussbaum and A Sen (eds) *The Quality of Life* (OUP, Oxford 1993) 173-176.

The problem is that the Aristotelian test is confined in the present. Complex equality allows for a historical enquiry. To use a simplistic analogy, it is like replacing a photograph with a piece of film; Aristotle provides the judge with a highly decontextualized "snapshot" of who he has in front of him, and what has (recently) happened to them. Walzer encourages the judge to "look behind" this, revealing both the true identity of the comparators, and any secret advantages which they may enjoy, or disadvantages from which they may suffer, and the true nature of the grounds upon which the distribution was made.

9.2. Formulating the argument

In the previous section, several metaphors illustrating the differences between the Aristotelian approach to equality and the Walzerian one were encountered (snapshot and film, branch and root, and so on). It is easy to come up with more such metaphors. One could say that Aristotle was the analogue to Walzer's digital[5], or that while Aristotle insisted that there was only one straight line between two given points, Walzer would argue, in a post-Einsteinian way, that the number of possible straight lines was infinite; this last metaphor is not entirely fortuitous, there being a clear conceptual link between Walzer's relativism and Einstein's relativity – Walzer, like Einstein, cares deeply about the standpoint of the observer. Turning to the world of medicine, one could say that the Walzerian test represented the scalpel to Aristotle's sledge-hammer, or, in the field of car mechanics, that Aristotle was merely tinkering where Walzer provided an overhaul.

Of course, these metaphors cannot go far enough by themselves to convince a reader that Walzer's theory of complex equality *should* be used by the European Court of Justice as an complement to the Aristotelian test, or, if so, *why*. It is hoped in this section to delve a little deeper into the issues in order to formulate a more persuasive argument.

A lot of the metaphors imply an absence of subtlety on the part of the Aristotelian test, and a concomitant presence of subtlety in Walzer's technique. It is true that, where Aristotelian eyes can usually only distinguish the two poles,

[5] Although given the digital system's dependence on a binary code, in which everything is *either* a zero *or* a one, one might wonder if it would not make a better cipher for Aristotle's test.

or extremes, of a given situation, the more focused eyes of the complex egalitarian can make out the intermediate degrees – one could talk of the ECJ's current test being too black-and-white, while a Walzerian approach might enable the judges to discern the various shades of grey. The problem of intermediaries has been seen a few times in this dissertation, for example, in the case of *Beltrante*[6], dealt with in the chapter on non-suspect grounds. In this case, there are two "extremes" (parents of dependent children and parents of quasi-dependent children, that is, those who are above the age of majority but unemployed), but an applicant like Mr Beltrante can find himself caught between them, for example, as the parent of a quasi-dependent child whose dependency – in adulthood – stems from disability[7]. While there may be superficial similarities between him and the other members of the second category, the increased anxiety which he might feel for his child, if the child lived in another country, and his desire for filial visits whenever possible, would make him more a kin to a parent in the first category. However, unable to deal with specificities or to take decisions on a case-by-case basis, an Aristotelian judge erects – almost arbitrarily – a barrier between the supposedly deserving and the supposedly undeserving. A Walzerian judge, on the other hand, judges who is deserving by reference to the meaning of the thing deserved, and accepts that there is no hard-and-fast answer to this because the meaning is always changing.[8] This method is less elegant[9], but arguably much more just.[10]

9.3. In search of flexibility

The lurching between like and unlike which is symptomatic of the Aristotelian test is often caused by a sudden and dramatic shift in perspective. Many of

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[6] Case T-48/89 *Fernando Beltrante and others v Council of the European Communities* [1990] ECR II-493.

[7] This is theoretical only; it is not known if this was the actual situation that Mr Beltrante was in.

[8] While a decision that two things are like – or unlike – may be much harder to reverse. An example is *Maruko* on the subject of same-sex partnerships vis-à-vis (heterosexual) marriage: Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757. But this would seem to be very exceptional.

[9] Walzer would be the first to admit that complex equality is not an elegant theory. See M Walzer, *Spheres of Justice – A Defense of Pluralism and Equality* (Basic Books, New York 1983) 21 (hereinafter referred to as *Spheres of Justice*): "The theory that results is unlikely to be elegant".

[10] Another example of an "intermediate" case is *Omega*, also dealt with in the chapter on non-suspect grounds: Joined cases C-27/00 and C-122/00 *The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd (C-27/00) and Omega Air Ltd , Aero Engines Ireland Ltd and Omega Aviation Services Ltd v Irish Aviation Authority (C-122/00)* [2002] ECR I-2569.

those writing about equality these days are seeking a "happy medium" between, to use cinematic terminology, the "wide shot" which shows all people (or all objects) as the same, and the "close-up" which lays bare their individual differences. In his famous essay about the politics of difference, Charles Taylor declares that "[t]here must be something midway" between the two approaches[11]. However, what is sought may not be a single point at all, but rather acknowledgement of the *continuum* which exists between the two types of "shot"; the lens in a camera or telescope would in fact be of little use if it could only discern those things right in front of it, or those things many miles away. The call, then, is for *variability*, for *flexibility*. Fittingly, what lies at the end of the rainbow is the ability to make out all the colours.

Among those hunting for flexibility, from amongst those writers already encountered in this dissertation, are McCrudden, who supports a changeable approach to European anti-discrimination law:

> *"What is necessary, then, is a recognition that different equalities are in play in different situations."*[12]

O'Leary too, lambasting the Court's "one solution fits all approach"[13], calls for variability:

> *"[N]ational authorities and, ultimately, the Court of Justice, may have to engage in a case-by-case assessment of whether denial of a benefit is reasonable given the individual circumstances of the claimant and the characteristics of the benefit."*[14]

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[11] "There must be something midway between the inauthentic and homogenizing demand for recognition of equal worth, on the one hand, and the self-immurement within ethnocentric standards, on the other": C Taylor, "The Politics of Recognition" in C Taylor, *Multiculturalism: Examining the politics of recognition* (Princeton University Press, Princeton 1994) 72.

[12] C McCrudden, "The new concept of equality" (Paper prepared for the Academy of European Law conference, "Fight Against Discrimination: The Race and Framework Employment Directives" 2/6/03-3/6/03) <http://www.era.int/web/en/resources/5_2341_679_file_en.796.pdf> accessed 14 April 2009, 24.

[13] S O'Leary, "Developing an ever closer union between the peoples of Europe? A reappraisal of the case law of the Court of Justice on the free movement of persons and EU citizenship" 2008 YEL 27, 193.

[14] Ibid., at 192, emphasis added. This approach is highly Walzerian, putting as it does the identity and situation of the distributee, and the nature of the distribuend, at the centre of the enquiry.

9.4. But does flexibility lead to uncertainty?

On the other hand, if meanings are always changing, could it be argued that a Walzerian approach might lead to uncertainty? As has already been seen countless times in the main case-study chapters, any final conclusion as to whether a given distribuend was distributed correctly or not is contingent upon the discovery of its shared meaning, which in turn is contingent upon the say-so of the distributive community itself. Even if it is accepted that the judge is the final arbiter and therefore that his conclusion is *not* contingent, the many others involved in the dispute, particularly the client being advised by his or her lawyer, must make do with at best a provisional, qualified response to the question. Such uncertainty could be disadvantageous to a client whose decision whether or not to proceed with their case requires a robust prediction of the outcome, not an interim hypothesis. However, under Walzer, the prognosis made in the lawyer's office should not differ too much from the final decision reached in Luxembourg, since both lawyer and judge are basing their conclusion on the same thing, in contrast to the situation under Aristotle, where the result of the like-for-like test, like the famous "Chancellor's foot" in English law[15], varies from one beholder to the next.

Such "precedents" as there are under Aristotle are bogus; what was like today may be unlike tomorrow. Walzer at least acknowledges the ongoing nature of the debate and tries to incorporate it, but this in no way necessitates uncertainty. Although it may fluctuate, a doctor will still be able to take the temperature of his[16] patient at any given moment and respond in the manner appropriate to that reading, and for that person, with that condition. The "manner appropriate" is known due to years of experience (both his and others'), and the building up of *genuine* precedents. Thus, the doctor can usually predict the sequence of events with *a great deal* of certainty. If changeability were a bar to prediction, doctors could effectively be abolished. Similarly, in contemporary physics, irregularity is no longer viewed as totally separate from regularity, but as generated by the same kind of mathematics. Indeed, the idea of treating

[15] For a nice account of this story, see SH Bailey et al, *Smith, Bailey and Gunn on the modern English legal system* (Sweet & Maxwell, London 2002) 5.
[16] Gender-neutral.

perfection and imperfection – chaos and pattern – as two separate systems, as opposed to two parts of the same system, is distinctly old-fashioned. The physicists' breakthrough here, that is, to stop viewing the two phenomena as two distinct poles and to view them instead as two ends of the same spectrum, should set a precedent for lawyers grappling with sameness and difference. Indeed, the image of the continuum, or rainbow, has already been encountered above. The results of Walzer's test may be variable, but the underlying system remains constant, and identifiable.

9.5. Macro and micro: the equilibrium of co-existence

The main source of problems, from the EU legal point of view, is the European Union's split-level structure, mentioned above[17]: the Member States on the one hand, and the Union itself on the other.[18] This can mean that there are two co-existent distributive communities, at least in areas where the EU does not yet have total competence, but even in some areas where it does – a micro sphere within a macro sphere. And it is not just different goods which may be distributed at the two levels, but also different aspects *of the same good*. To understand this, it is helpful to recall a slogan that was popular in the arena of EC monetary policy in the Seventies: the Snake in the Tunnel. This refers to the experiment whereby the Member States attempted to prevent wild fluctuations between the European currencies by setting them a maximum of 1.125 percent above the dollar and a minimum of 1.125 percent below the dollar (the "Tunnel"), leaving individual currencies free to move about within these, *but not beyond them* (the "Snake"). This imagery could be adapted to represent the situation when, for example, the Community institutions have decided to legislate on a certain matter, say, by means of a Directive. The macro sphere (the Community itself, made up of all of the Member States) is responsible for drafting the Directive, that is, for setting out the basic coordinates of the new law, what it is hoped will be achieved, and, most importantly, the parameters within which the Member States will be expected to act. This is the Tunnel. The distributive community for the Tunnel is the whole of the EC: all citizens of all Member States have the right to participate in the debate, either via their MEP's in the

[17] See supra section 5.1, last paragraph.

[18] Although of course in many ECJ equality cases, only the micro level is implicated. It is mainly in the field of nationality discrimination that the macro level comes into play.

Parliament and the Ministers of their Government (elected by them) in the Council, as at present, or else via some new means, yet to be invented. Thus, the Tunnel will be distributed, to the Member States, in accordance with what it means, collectively, to *all of them*. The micro level (the individual Member State) is responsible for implementing the Directive within the national borders, in other words, deciding on the best ways to achieve the goals set out in the Directive, and then putting those decisions into practice. This is the Snake: the Member State must work within the parameters set by the Community, but must not go beyond them. The distributive community for the *Snake* is the whole of the Member State concerned.

The point is nicely illustrated by the *FEDESA* case[19]. Here, the Council approved a Directive prohibiting the use in livestock farming of certain substances having a hormonal action. FEDESA complained that the Directive had had unequal consequences. The new obligations to be fulfilled were the same for all Member States. That meant that the differentials between levels of protection[20] in the different Member States remained identical, even after implementation of the Directive: Member States with a high level of existing protection still had a high level of protection, and Member States with a low level of existing protection still had a low level of protection. However, the Court had no sympathy for FEDESA's argument. It was true that all Member States had to fulfil the same new obligations (Tunnel), but, as long as that was done, continuing divergences between them did not breach the principle of equal treatment (Snake). In other words, the new obligations were a product of the macro distributive community – a single sphere with no internal boundaries. But the Court was happy to re-erect the boundaries as between the Member States when it came to the Member States' *overall* policies on this issue; whether they wanted a high or low level of *overall* protection was a decision for each of them to make separately.

Litigants will sometimes champion the micro sphere, and other times the macro sphere, depending on their interest. FEDESA was fighting for a macro sphere on that occasion; many product-manufacturers looking to conquer the whole of the EU market with a single design will (usually rightly) do the same. In the

[19] Case C-331/88 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* [1990] ECR I-4023.
[20] Against hormones finding their way into foodstuffs.

competition case of *Distillers*[21], meanwhile, the litigant bemoaned the new EEC obligation to charge the same price for whisky in every Member State, because, according to it, the customs and traditions pertaining to the consumption of whisky were different from one State to the next. It was arguing, unsuccessfully as it turned out, for the Community to be viewed as nine[22] micro spheres, each distributing whisky after its own fashion. What is sometimes hard for litigants (and others) to grasp is that the two models – one large sphere, many small spheres – co-exist. Which one is to the fore depends on the circumstances, hence the absolute necessity for the Court to adopt a variable approach.[23] Walzer expresses this well, using the metaphor of the mirror which Hamlet holds up to his mother[24]. The viewer looks in the mirror and sees what is wrong, where the definition of "wrongness" is the viewer's own. Each viewer or group of viewers has their or its own mirror. But sometimes the definitions will coincide. As he puts it,

> *"Nor is the meaning of critical exposure always a local and particular meaning. If what is rotten in the state of Denmark includes murder and betrayal, then all of us can recognize the rottenness. For some purposes, we all stand in front of the same mirror. But only for some purposes…"*[25]

For some purposes, then, the citizens of the European Union "stand in front of the same mirror". For others, "local and particular" meanings return, and the one mirror becomes twenty seven separate ones.

However, sometimes, a clash of the models is unavoidable. An oft-quoted example is the *Danish Bottles* case[26]. Here, a local law establishing a complex "return" system for bottles, the aim of which was the reduction of waste and the protection of the environment, was alleged to be a hindrance to the free movement of goods. Although it accepted that protection of the environment was, in principle, a justification for the action (a so-called "mandatory

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[21] *The Distillers Company Limited* [1978] OJ L50/16, [1978] 1 CMLR 400; on appeal Case 30/78 *Distillers Company v Commission* [1980] ECR 2229, [1980] 3 CMLR 121.
[22] The case was first brought in 1978.
[23] See supra.
[24] *Hamlet*, III.iv.
[25] M Walzer, *The Company of Critics: Social Criticism and Political Commitment in the Twentieth Century* (Basic Books, New York 1988, 2nd edn 2002) 233.
[26] Case 302/86 *Commission of the European Communities v Kingdom of Denmark* [1988] ECR 4607.

requirement"[27]), the Court went on to hold that Denmark's behaviour was – at least partially – disproportionate to this aim. While some have praised the decision, given that a system such as the Danish one was not *in theory* declared to be inimical to the free movement of goods[28], Denmark's defeat *in practice* here spells a victory for the macro sphere over the micro one. Was permission to trade in bottles to be distributed at micro level, where, in this case, environmental concerns were the dominant consideration? Or was it to be distributed at macro level, where economics took greater priority? And if the latter, is the Court itself guilty of a boundary breach here – dethroning the local Distributor and rewriting the distributive criteria after its own fashion, ignoring those arrived at by the populace?

Although a cursory study of Walzer's work might suggest that micro should always triumph over macro, particular over universal, this is not in fact strictly the case. As he made clear in a famous essay of 1990, and reiterated in a book of 2004, the outer sphere must sometimes take precedence. Writing in the context of the State's relation to its citizens, he observes as many others have[29] that classic liberalism produces a society of bloodless, abstract individuals, each free to choose their own conception of "the good", but, in relation to one another, isolated, divided, fragmented, and undetermined:

> *"The members of liberal society share no political or religious traditions; they can tell only one story about themselves and that is the story of ex nihilo creation, which begins in the state of nature or the original position. Each individual imagines himself absolutely free, unencumbered, and on his own".*[30]

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[27] Ibid., paras. 8 and 9.

[28] Sexton goes as far as to call *Commission v Denmark* "a landmark decision for environmentally minded States": "This decision represents the first time the Court has allowed Member States to enact environmental protection measures contrary to economic integration": TRF Sexton, "Enacting national environmental laws more stringent than other States' laws in the European Community: *Re Disposable Beer Cans: Commission v Denmark*" 24 Cornell Int'l LJ 563, 593 and 564.

[29] Charles Taylor's essay "Atomism" is one of the most well-known versions of this observation: C Taylor, "Atomism" in C Taylor, *Philosophical Papers Vol 2: Philosophy and the Human Sciences* (CUP, Cambridge 1985). But see also J Waldron, "The Cosmopolitan Alternative" in W Kymlicka (ed) *The Rights of Minority Cultures* (OUP, Oxford 1987) for a celebrated rebuttal of Taylor and others.

[30] M Walzer, "The Communitarian Critique of Liberalism" Political Theory, Vol 18, No 1 (Feb 1990) 6, 7-8, Walzer's emphasis (hereinafter referred to as *Communitarian Critique*).

Walzer's "communitarian critique", however, requires States to remedy this by "sponsor[ing] certain sorts of communal identification"[31] and "foster[ing] associative activities"[32]:

> *"[T]he communitarian correction does require… a state that is, at least over some part of the terrain of sovereignty, deliberately nonneutral."*[33]

The State, then, must sometimes step in to protect those groups within the community which are "at risk"[34]. It follows that this nonneutral State must from time to time lend its support to a certain identity, in the process withdrawing its support from another: it must "discriminate among… assemblies"[35], the macro sphere – on that particular occasion – overruling the micro one. So although by nature hostile to what might be called "outside intervention", outsiders deciding something which it is the insiders' right to decide, Walzer does endorse it when it is needed precisely to uphold the system which bestows this right to begin with: being cruel to be kind.[36]

In *Politics and Passion*, Walzer again examines the situation of a smaller group within a larger one, and reaches similar conclusions. Where the larger one is the State, its need occasionally to overrule the smaller one, in the name of "assist[ing]" other smaller groups which find themselves under threat, is seen again.[37] The same sense of having to be cruel to be kind is encountered: the cultural community at issue must engage with the larger entity, and vice versa, precisely to ensure the relevant culture's perpetuation:

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[31] Ibid., 7.
[32] Ibid., 16.
[33] Ibid.
[34] Ibid., 17.
[35] Ibid., 19.
[36] As he puts it, "the only theory that is necessary to the communitarian critique of liberalism is liberalism itself": ibid., 8. State intervention, although not *unfettered* state intervention, was also discussed by Walzer in a 1993 essay: M Walzer, "Exclusion, Injustice, and the Democratic State" Dissent, 40 (1993), 55. This is considered in more detail supra, at section 7.2.3. An example of a sphere-within-a-sphere utilized by Walzer in *Spheres of Justice* is that of a church within a State (at 35-42, for example). Such a church could enact its own rules on membership, content of services, upkeep of buildings, and so on, but it would still be subject to the laws of the land vis-à-vis crime, tax, et cetera.
[37] M Walzer, *Politics and Passion: Toward a More Egalitarian Liberalism* (Yale University Press, New Haven 2004) 40 (hereinafter referred to as *Politics and Passion*): "A form of state provision designed to assist the weaker groups will be a *necessary – and permanent* – feature of any egalitarian multiculturalism" (Walzer's emphasis).

> *"So the internal hierarchies of group life are tolerated by this version of egalitarianism but also simultaneously subverted."*[38]

And in the event of a clash, at least where the cultural community poses a threat to the larger entity, he is clear that the balance should be tilted *against* the community.[39] However, he warns that this is advisory only:

> *"This liberal tilt is simply a guideline for decisionmaking in a political crisis. It doesn't solve the problem of day-to-day coexistence. For that there is no theoretical solution, no deduction from a set of principles, only a long and unstable series of compromises…universal happiness is not a plausible political project."*[40]

This caveat should be taken as applying to this dissertation as well. The Walzerian model – with the general rule of micro trumping macro, and the exceptional "rule" of macro trumping micro – should be seen as nothing more than a "guideline for decisionmaking".[41]

This model can be extrapolated outwards – mutatis mutandis – to create, in Walzer's own phrase, a "republic of republics"[42]. Whether this could ever work at the global level is questionable[43], but the European Union is certainly very close to a working model of the republic of republics, which, as Walzer mentions

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[38] Ibid., 57.
[39] Ibid., 64. This does seem to be a softening of his line in *Spheres of Justice*.
[40] Ibid., 65.
[41] It is not the intention of the foregoing to promote the EU as a whole to the role of "State", and to relegate its current Member States to that of "secondary associations", or to insinuate that the latter pose "threats" to the former, and so on. These two pieces of Walzer's are considered only for the insight they can give into the troublesome question – not dealt with in *Spheres of Justice* – of how an alleged boundary breach is to be dealt with where the spheres are not adjacent but concentric. Are the borders of an inner sphere impenetrable, or porous? As usual, it will depend on whether the *business* of the outer sphere (for want of a better term) is part of the shared meaning of the distribuend at issue in the inner sphere – shared by the members *of the inner sphere*, that is. But these pieces rightly draw attention to the atypical nature of the situation. The same rules as would apply were the two spheres side by side cannot apply here; new rights and responsibilities flow from the fact of the one being inside the other. Returning to the question of State versus individual(s), Walzer has in fact written of his "dilemma" in trying to find a midway point between the porous inner border and the impenetrable one – full intervention in the inner sphere and none: *Politics and Passion*, 171 (footnote 8 to chapter 3). If he were prepared to move one level of analysis up, he might find the EU to provide just such a creature, at least in embryonic form.
[42] *Communitarian Critique*, 20.
[43] See the section entitled "Conclusion: Global Equality" in *Politics and Passion*, 131 et seq, where Walzer looks at some of the difficulties which the global version might encounter.

in a footnote, goes hand in hand with complex equality.[44] So while Danish shared meanings should be respected ordinarily[45], a case can be made for the macro sphere – the EU as a whole – intervening via its Court to check Denmark's environmentalism where the "bigger picture" may be at stake.[46]

9.6. Complex equality and European Union

The situation seen at the end of the previous section is, it is stressed, the exception. Under normal circumstances, the theory of complex equality favours *local* norms and *local* meanings, and to apply a local meaning outside its sphere may constitute a boundary breach. Each sphere has its own meanings and those visiting a sphere from outside should ordinarily respect these: "When in Rome, do as the Romans do". The question is, does such an approach suit the European Union and its law, and more particularly its Court and its Court's approach to equality?

Of course, one of the chief missions of the EU is to prevent European markets from being ring-fenced along national borders; this inevitably means that a fence erected by a Member State – usually in the form of a national law – will be struck down as a hindrance to free movement. In this specific sense, it could be said that local meanings are being routinely jettisoned in favour of non-local meanings in which the Member State concerned had no say whatsoever, contrary to complex equality[47]. The Belgian community may have felt that it was

[44] *Communitarian Critique*, 23 (footnote 21).

[45] This is also in keeping with the principle of subsidiarity, where action at the higher level should only be contemplated if there is no solution to be found at the lower level. See below for further discussion of this point.

[46] In this case – perhaps – the EU's need for a functioning system of trade, and efficient collection of VAT monies which then feed Union projects, *including* environmental protection. Again there is a sense here of the macro sphere's being "cruel to be kind", denying pluralism to sustain it, suppressing environmentalism to promote it, but the environmentalism promoted is likely to offer greater protection than the environmentalism suppressed. Of course being part of the EU requires Member States to accept that there is a "picture" bigger than their own, and if the acceptance comes hard this is almost certainly an occurrence or reoccurrence of the *demos* problem so masterfully identified by Weiler in his seminal paper: JHH Weiler, "Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision" (1995) 1(3) European Law Journal 219. As he puts it, "majority rule is only legitimate within a demos… a parliament without a demos is conceptually impossible, practically despotic" (at 228-231). Such questions, and their elusive answers, are regrettably beyond the scope of this dissertation.

[47] Although this is to ignore the second, "macro" sphere which encompasses all Europeans (see supra section 5.1.). *This* distributive community, having agreed, via election of representatives and sometimes even via referendum, to create/ join the EU, has also agreed to the principle of

having Spanish rules on surnames foisted upon it in *García Avello*, for example, and that its view on the meaning of a surname was being ignored.[48]

However, many aspects of European Union do follow the "When in Rome" precept, making complex equality a good match for the EU project generally.[49] In cases like *Baumbast*[50] and *Collins*[51], for example, the migrants actually sought the host State's benefits, and, certainly in *Baumbast*, the Court took a very Walzerian line by insisting that the UK accede to their request; Mr Baumbast was in Rome, and was entitled to be treated as other Romans. In cases like *Konstantinidis*[52] and *Laval*[53], the basic rule seemed to be that the migrant worker or service provider should take the host State rules as he found them, unless they were overridden by Community primary or secondary legislation.[54] Similarly, in *Vlassopolou*[55], the host State's rules on professional qualifications took precedence, just as long as it did not ignore whatever skills or knowledge the migrant worker had brought with him or her, and, if they were

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non-discrimination on the grounds of nationality, at least as a *grundnorm* for its regional legislation. So the members of the micro distributive community (*qua* members of the *macro* distributive community) have had a bigger "say" in things than they may think. Of course, that still does not mean that they had a say in their neighbour's law. But, by agreeing to equality on grounds of nationality, they accepted a "tunnel" (see the discussion at supra section 9.5.), which foreclosed certain options to them in the drafting of their *own* law. The point is that *this foreclosure* was something which they distributed themselves, to themselves, in accordance with a meaning *which they shared*, even if they later chose to forget it.

[48] Case C-148/02 *Carlos Garcia Avello v Belgian State* [2003] ECR I-11613. Similarly, in the more recent case of *Grunkin*, the German community may have felt that it was having Danish rules on surnames foisted upon it, in disregard of *its* view on the meaning of a surname: Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-7639.

[49] Tsakatika, although undertaking a very different project to the present one, has also found communitarianism useful in analysing the EU (communitarianism as a whole, that is, not any one particular theory): M Tsakatika, *Political responsibility and the European Union* (Manchester University Press, Manchester 2008).

[50] Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.

[51] Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703.

[52] Case C-168/91 *Christos Konstantinidis v Stadt Altensteig* [1993] ECR I-1191.

[53] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767.

[54] As Advocate General Bot said in the *Dirk Rüffert* case (a follow-up to *Laval*), "as a general rule, Community law does not preclude Member States from applying their legislation… to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established": Case C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989, at 2010 (Para. 69 of the Opinion). As authority for this proposition he uses Cases 62/81, 63/81 *Société anonyme de droit français Seco and Société anonyme de droit français Desquenne & Giral v Etablissement d'assurance contre la vieillesse et l'invalidité* [1982] ECR 223.

[55] Case C-340/89 *Irène Vlassopoulou v Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg* [1991] ECR I-2357.

deemed insufficient, was prepared to offer him or her an opportunity to prove that he or she in fact possessed the knowledge and qualifications which were lacking (as opposed to making him or her start from scratch).

It is probably in the sphere of the free movement of goods that EU law could be said to be at its most anti-Walzerian, with the doctrine of "mutual recognition"[56] effectively forcing a host Member State to accept the decisions of an alien distributive community as valid for its own. A foreign meaning is thus imposed on a Member State by one of its neighbours – "If it's good enough for the home Member State, it's good enough for the host Member State". However, even in this area the tide is beginning to turn, with the *Keck* case[57] signaling a partial return to local regulatory autonomy (or the so-called "country of destination principle"). As Weiler has commented, the situation now is that a foreign seller, in return for not being excluded from the host State's market, must respect the host State's selling arrangements, in exactly the same way as a foreign company would have to respect the host State's tax arrangements, or a foreign visitor would have to respect the host State's criminal law[58].

This taking back of sovereignty by Member States is also in keeping with the doctrine of subsidiarity, by which the Union should take action "only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States"[59]. And since the ECJ already has to operate a kind of

[56] Deriving from the case of "Cassis de Dijon": Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.
[57] Joined cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097.
[58] Joseph Weiler, "Towards a Principle of Economic Comity". Lecture given at Bentham House, UCL, 23 May 2001. A selling arrangement may "reflect deeply-held policy choices about the character of national life": Daniel Wilsher, "Does *Keck* discrimination make any sense? An assessment of the non-discrimination principle within the European single market" ELRev 2008, 33(1), 3, 21. Indeed, the Court has acknowledged this, describing the consumption of alcoholic beverages in the *Gourmet Foods* case as being "linked to traditional social practices and to local habits and customs". See Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)* [2001] ECR I-1795, para. 21.
[59] Art. 5 EC (now Art. 5(3) TEU). McCrudden has commented that, as long as there is a continued dialogue between the Member States and the Commission, "the strategy of devolving responsibility back to the Member States… has much to commend it". See C McCrudden, "The new concept of equality" (Paper prepared for the Academy of European Law conference, "Fight Against Discrimination: The Race and Framework Employment Directives" 2/6/03-3/6/03) <http://www.era.int/web/en/resources/5_2341_679_file_en.796.pdf> accessed 14 April 2009, 23.

"jurisdictional subsidiarity"[60], complex equality would not represent a particularly big leap forward. Even theorists have spotted the link between complex equality and subsidiarity; Den Hartogh refers to it as "a principle to which Walzer often appeals"[61]:

> *"Principles of justice should be applied by collective decisions of the smallest circle of people who can apply them efficiently."*[62]

The *Keck* judgment and the doctrine of subsidiarity may have what Bernard has called "a decentralising effect"[63], but as he rightly goes on to stress, centralization is not a sine qua non for integration, and "decentralisation is not synonymous with fragmentation"[64]. That the Court and other Community actors have come to understand this is indeed "a sign of maturity"[65]. It is submitted that the Court's adoption of a complex egalitarian theory of equality would fit perfectly with this new, mature approach to EC law.

Gareth Davies has called for a more sophisticated, less formalistic and above all adaptable approach to equality. Again, Walzer's theory would seem to fit the bill. In particular, the way that the theory of complex equality permits "small inequalities" within a given sphere – perhaps Walzer's most innovative proposal and the facet of the theory which marks its point of departure from simple equality[66] - would seem to meet Davies' requirement that the notion of equality be separated from that of uniformity ("the principle of one rule for all"[67]):

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[60] A Iliopoulou, "Le principe d'égalité et de non-discrimination" in J-B Auby and J Dutheil de La Rochère (eds), *Droit administrative européen* (Bruylant, Brussels 2007) 449.
[61] G den Hartogh, "The Architectonic of Michael Walzer's Theory of Justice" Political Theory, Vol 27, No 4, Aug 1999, 491, 508.
[62] Ibid.
[63] Nicolas Bernard, "Discrimination and Free Movement in EC Law" [1996] 45 ICLQ 82, 108.
[64] Ibid.
[65] Ibid.
[66] Also the facet of the theory which has most confused Walzer's critics, for example, Richard Arneson, who lambasts complex equality as "a very weak brew, in which any element of anything that could plausibly be identified with egalitarianism is so diluted as to be virtually undetectable": RJ Arneson, "Against "Complex" Equality" in D Miller and M Walzer (eds), *Pluralism, Justice, and Equality* (OUP, Oxford 1995) 226.
[67] G Davies, *Nationality Discrimination in the European Internal Market* (European Monographs, Kluwer, The Hague 2003) 201.

> *"The tendency to treat [equality] as synonymous with uniformity is logically false, and can often be a route to intolerance."*[68]

The distribution of student maintenance grants, for example, takes place within its own, autonomous sphere and in accordance with the relevant distributive community's shared understanding of such grants. But that does not mean that every single student qualifies, at exactly the same moment, for exactly the same grant (as Davies puts it, "[t]he prohibition on nationality discrimination does not demand equal fees"[69]). To go back to the education example in Chapter 2[70], that would be the equivalent of every student in the class receiving the same grade. Under a Walzerian regime, variety is allowed; in Davies' terms, Walzer can "cope with difference"[71]. While Aristotle presents the Court with a black-and-white choice – insiders versus outsiders, for example – Walzer's more detailed analysis enables the Bench to place the choice in its wider context and to "recogni[ze]… what has occurred outside the jurisdiction"[72]. This allows for a more nuanced decision – a dimmer switch rather than one that can only go on or off.

[68] G Davies, "Higher education, equal access, and residence conditions: Does EU law allow Member States to charge higher fees to students not previously resident?" 12 MJ 3 (2005) 240.
[69] Ibid.
[70] See supra, section 2.2.
[71] Davies, supra n 67, 202.
[72] Ibid., 201.

10. Conclusion

The Walzerian approach to equality exposes the Aristotelian test for all of its limitedness and shortsightedness, and admits a world of possibilities beyond the playing-board. Likes within the same sphere may be treated unlike unjustly (boundary breach) *or* justly ("small inequality"). Unlikes within the same sphere may be treated unlike justly ("small inequality") *or* unjustly (boundary breach).[1] Likes within the same sphere may be treated like justly (correct placement of boundaries, correct distributive criterion) *or* unjustly (boundary breach, or wrongful placement of boundaries in the first place). Unlikes within the same sphere may be treated like unjustly (boundary breach) *or* justly ("small inequality"). A similar list could be drawn up for likes or unlikes who or which find themselves in separate spheres[2], a boundary breach or wrongful (initial) placement of boundaries usually being at the root of any and all injustice. Like treatment could now be merely a coincidence, or it could perhaps indicate a boundary breach by the *distributor*. Even within this paragraph, it has been difficult to "shoe-horn" the myriad possibilities into the strictures, physical, temporal and perspectival, of the terms "like" and "unlike", but it is only intended to provide a rough indication of the poverty of the Aristotelian test when faced with the richness of human experience.

It is submitted, then, that the thesis is verified and that Michael Walzer's theory of Complex Equality may be used by the European Court of Justice when dealing with cases concerning equality, as a complement (at the very least) to the Aristotelian "test" that likes should be treated in like fashion and unlikes in unlike fashion. Like a cataracts operation for the ECJ judge, Walzer's "radically particularist"[3] theory finally restores his full sight and enables him for the first

[1] A serf and a King, for example, receive unequal treatment justly under normal circumstances, but unjustly if the King has no business wearing his crown in that sphere. Even then, that does not mean that he is to be stripped of his crown permanently, just that he must only wear it in the sphere in which he was coronated.

[2] While the latter – unlikes in separate spheres – might seem to be the more obvious scenario, an example of the former – likes in separate spheres – would be where two farmers were receiving quotas *for different crops*, or where two manufacturers were receiving finance *for different products*. This situation came up, in one of the pleas, in Joined cases 424/85 and 425/85 *Coöperatieve Melkproducentenbedrijven Noord-Nederland BA ("Frico") and others v Voedselvoorzienings In- en Verkoopbureau* [1987] ECR 2755, discussed at supra section 6.4.

[3] *Spheres of Justice*, xiv.

time to see the special cases, the exceptions, the *substance* of the dispute; the "dilemma of difference", referred to in the Introduction[4], is resolved.[5]

Attempting to apply overly reductive and unitary rules and tests, from the top of the mountain (to use one of Walzer's favourite images), to involved and complex situations on the ground (or "in the cave"), produced at best hit-and-miss results – the misses often being catastrophically bad, and the hits more the result of good luck than design. It was like trying to wind an intricate watch while wearing an oven glove. Particularism allows the judge to contextualize each comparison. With its emphasis on proceedings in the Forum, complex equality effectively allows citizens to equalize themselves[6].

Critics of the theory, though, see danger lurking in the Forum. Some have tried to fix the problem by combining Complex Equality and its context-dependency with something else, some universalist element that will (in their view) provide the missing safeguard; in this regard, Habermas' ideal speech theory is especially popular[7]. O'Neill describes this hybridity particularly well, referring to his own approach as "contextual impartialism"[8]. In this dissertation, this kind of synthesizing of Complex Equality with distinct theories has not been thought necessary. Walzer's partiality – should it be considered dangerous – is sufficiently offset, it is submitted, firstly, by the Override, and secondly, by the doctrine of co-existential equilibrium, both of these traceable to or rooted in his own writing.

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[4] See supra section 1.2.

[5] As Armstrong puts it, Walzer offers "a highly positive intervention into the apparent impasse between equality and difference" and indeed a "synthesis" of the two ideas: C Armstrong, "Complex equality: Beyond equality and difference" 2002 Feminist Theory 3, 67, 68 and 80.

[6] Jürgen Habermas was perhaps thinking along the same lines when he wrote, "For in the final analysis, private legal persons cannot even attain the enjoyment of equal individual liberties unless they themselves, by jointly exercising their autonomy as citizens, arrive at a clear understanding about what interests and criteria are justified and in what respects equal things will be treated equally and unequal things unequally in any particular case." See J Habermas, "Struggles for Recognition in the Democratic Constitutional State" in C Taylor, *Multiculturalism: Examining the politics of recognition* (Princeton University Press, Princeton 1994) 113.

[7] S O'Neill, *Impartiality in Context: Grounding Justice in a Pluralist World* (SUNY Press, Albany 1997); L Atkinson, "Coming to Terms with Procedure: The Potential of the "Ideal Speech Situation" for Michael Walzer's Communitarian Justice" 56 U Toronto Fac L Rev 1998, 223; ST Johansson, "Towards spherical justice: a critical theoretical defence of the idea of complex equality" (PhD thesis, University of Southampton 2003, unpublished).

[8] O'Neill, supra n 7, 201.

It is important, though, that Complex Equality is not made to stand or fall on the question of who should ascertain the meanings of distributed goods. The doctrine still has much to offer whoever does the ascertaining. If use of the Walzerian Forum is thought to pose a threat to the EU itself, then this aspect of the theory may be shed while still preserving the kernel of Complex Equality – analyzing the allegedly discriminatory act, not in terms of comparisons of the actors involved, but rather in terms of distributions and meanings of goods. This is the true heart of the theory – its ability to separate the people from the problem – and it is not lost if the task of ascertaining the meanings is entrusted to the Bench. The alternative theory of mediated complexity – admittedly representing a more significant departure from orthodox Walzerian doctrine – would be another way to rein in complex equality, if such reining in were needed.

Aristotelian "like for like" equality constrains those who apply it, and ultimately those in relation to whom it is applied. On the other hand, as Walzer has commented, "complexity is free":

> *"the more complex the [social] construction [of goods] the more room there is for cultural difference."*[9]

As the European Union grows wider, as the activities of its citizens – both individual and collective – grow more complicated and their relations one with another more sophisticated, this is a freedom which they already deserve, and which they will increasingly demand. The Court of Justice should be ready.

[9] M Walzer, "Objectivity and Social Meaning" in M Nussbaum and A Sen (eds) *The Quality of Life* (OUP, Oxford 1993) 171.

Appendix I

Column 1	Column 2	Column 3
Comparator 1 and Comparator 2	Treated	Outcome
Like	Like	Not discrimination
Like	Unlike	Discrimination
Unlike	Like	Discrimination
Unlike	Unlike	Not discrimination

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